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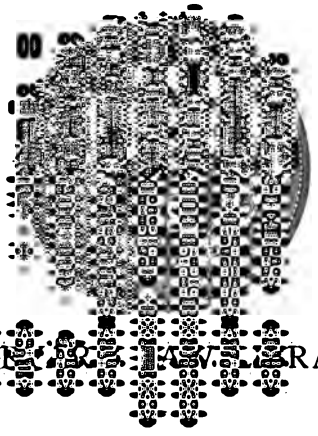
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CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS OF COLORADO

AT THE

JANUARY AND APRIL TERMS
A. D. 1915

E. T. WELLS
REPORTER

VOLUME 27

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1915

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COURT OF APPEALS OF COLORADO

REGULAR TERMS BEGIN ON SECOND MONDAY IN JANUARY, APRIL AND DECEMBER

JUDGES OF THE COURT DURING THE TIME OF THESE REPORTS

LOUIS W. CUNNINGHAM, PRESIDING JUDGE.

ALFRED R. KING,
EDWIN W. HURLBUT,
WILLIAM B. MORGAN,
JOHN C. BELL,
} ASSOCIATE JUSTICES.

JUDGES OF THE DISTRICT COURT AT THE PUBLICATION OF THESE REPORTS

HARRY S. CLASS, First Judicial District, Brighton.
W. D. WRIGHT, SR., Second Judicial District, Denver.
CHARLES C. BUTLER, Second Judicial District, Denver.
JOHN PERRY, Second Judicial District, Denver.
GEORGE W. ALLEN, Second Judicial District, Denver.
JOHN H. DENISON, Second Judicial District, Denver.
A. WATSON, McHENDRIE, Third Judicial District, Trinidad.
GRANBY HILLYER, Third Judicial District, Lamar.
J. W. SHEAFOR, Fourth Judicial District, Colorado Springs.
J. E. LITTLE, Fourth Judicial District, Colorado Springs.
W. S. MORRIS, Fourth Judicial District, Colorado Springs.
CHARLES CAVENDER, Fifth Judicial District, Leadville.
WM. N. SEARCY, Sixth Judicial District, Durango.
THOMAS J. BLACK, Seventh Judicial District, Montrose.
NEIL F. GRAHAM, Eighth Judicial District, Fort Collins.
ROBERT G. STRONG, Eighth Judicial District, Greeley.
JOHN T. SHUMATE, Ninth Judicial District, Glenwood Springs.
CHAS. S. ESSEX, Tenth Judicial District, Pueblo.
J. ED. RIZER, Tenth Judicial District, Pueblo.
CHAS. A. WILKIN, Eleventh Judicial District, Canon City.
JESSE C. WYLIE, Twelfth Judicial District, Alamosa.
HASLETT P. BURKE, Thirteenth Judicial District, Sterling.

JESSE C.
HASLETT P. bor
Sterling.

TABLE OF CASES REPORTED

	Page
A	
Abernethy v. Wright	289
American Co. v. Vickery	96
American Mills ats. Nitro Co.	373
Anderson ats. House	359
B	
Bacca v. McDermott	548
Beaver Creek Co. v. Elling	252
Birkle v. Peden	323
Boaz v. United Commercial Travelers	423
Bolton ats. People ex rel.	39
Butler v. Maier	365
C	
Campbell ats. Creighton	120
Carlton v. Cone	58
Carstarphen Co. ats. Degge	563
Central Locomotive Works v. Smith	449
Coale ats. Lancaster	495
Coe & Stedman Co. v. Coryell	61
Cole ats. Phillips Co.	540
Collier ats. Fraternal Association	245
Colorado Springs Co. v. Merrill	382
Conant v. Machen	310
Cone ats. Carlton	58
Conners ats. Equitable Co.	213
Continental Co. v. Knight	257
Cooper v. Golden &c. Co.	499
Coryell ats. Coe & Stedman Co.	61
Craft Co. v. Livernash	1
Craft Co. ats. Read	28
Creighton v. Campbell	120
Crystal Park Co. v. Morton	74
Culkin v. Matz	198
Curry v. Equitable Co.	175
D	
Dappen ats. Jones	21
Davis ats. Gunnison County	501
Davis ats. Starbird	467
Degge v. Carstarphen Co.	563
De La Vergne v. Globe Co.	308
Denver ats. Eisenhart	470
Devine v. Western Slope Association	368
E	
Eisenhart v. Davis	470
Elling ats. Beaver Creek Co.	252
Equitable Co. v. Conners	213
Equitable Co. ats. Curry	175
F	
First National Bank v. Martin	524
Fogg v. Quackenbush	480
Fostoria Co. ats. Hazard	118
Fraternal Association v. Collier	245
Fulton Co. v. Smith	279
G	
Gehrig ats. North Sterling Co.	551
Geijsbeek v. Martin	316
George v. Williams	400
Globe Co. v. De La Vergne	308
Gold Dollar Co. ats. Jenkins	247
Golden &c. Co. ats. Cooper	499
Gregg v. Hayes	412
Gunnison County v. Davis	501
H	
Harrison ats. Raymond	484
Hayes ats. Gregg	412
Hazard v. Fostoria Co.	118
Henry v. Semonian	487
Herbert v. Patrick	204
Hoover v. Jordan	515
House v. Anderson	359
Houston ats. Miller	89
Howard v. Mitchell	45
Hurdle ats. Mauser	567
I	
Idelson v. Robinson	507
Interstate Co. v. Wyatt	217
J	
Jenkins v. Gold Dollar Co.	247
Jewel ats. Stearns	390

	Page
Jones v. Dappen	21
Jordan ats. Hoover	515
Joslin Co. ats. Ocean Co.	52
K	
Kaufman ats. Lauer	419
King ats. Minter	233
Kirby ats. School District	300
Knight ats. Continental Co.	257
L	
Lancaster v. Coale	495
Lang ats. Post	225, 270
Lauer v. Kaufman	419
Lehl ats. Roberts	351
Las Animas County ats. Trinidad	207
Libby ats. Union Pacific Co.	111
Livernash ats. Craft Co.	1
Loveland & Co. v. Parks	571
Mc—Mac	
McCluer ats. Morrison	264
McDermott ats. Bacca	548
M	
Machen ats. Conant	310
Maier ats. Butler	365
Martin ats. First National Bank	524
Martin ats. Geijsbeek	316
Matz ats. Culkin	198
Mauser v. Hurdle	567
Merrill ats. Colorado Springs Co.	382
Miller v. Houston	89
Miller v. O'Brien	511
Milliken v. Neil	545
Mineral High School District ats. Ryan	63
Minter v. King	233
Mitchell ats. Howard	45
Moody v. Sindlinger	290
Morse ats. Rinderle	457
Morrison v. McCluer	264
Morton ats. Crystal Park Co.	74
N	
Nash ats. School District	551
Neil ats. Milliken	545
Nelson v. Nelson	104
New England Co. v. Shook	30
Newman v. Tibbitts	325
Nitro Co. v. American Mills	373
North Sterling Co. v. Gehrig	551
O	
O'Brien ats. Miller	511
Ocean Co. v. Joslin Co.	52
Oliver v. Wilder	337
Olsen ats. School District	562
P	
Parks ats. Loveland &c. Co.	571
Patrick ats. Herbert	204
Peden v. Birkle	323
Peery v. Peery	533
People ex rel. v. Bolton	39
Phillips Co. v. Cole	540
Post v. Lang	225, 270
Q	
Quackenbush ats. Fogg	480
R	
Raymond v. Harrison	484
Read v. Craft Co.	28
Rinderle v. Morse	457
Riverside Co. v. Smylie	321
Roberts v. Lehl	351
Robinson ats. Idelson	507
Rowe ats. Thompson	361
Ryan v. Mineral High School District	63
S	
School District v. Kirby	300
School District v. Nash	551
School District v. Olsen	562
Selkregg v. Thomas	259
Semonian ats. Henry	487
Shook ats. New England Co.	30
Sigel-Campion Co. ats Sorrells	154
Sindlinger ats. Moody	290
Smith ats. Central Locomotive Works	449
Smith ats Fulton Co.	279
Smylie ats. Riverside Co.	321
Sorrells v. Sigel-Campion Co.	154
Starbird v. Davis	467
Stearns v. Jewel	390

	Page
T	
Thomas ats. Selkregg	259
Thompson v. Rowe	361
Tibbitts ats. Newman	325
Trinidad v. Las Animas County	207
Trull v. Trull	109
U	
Union Pacific Co. v. Libby	111
United Commercial Travelers v. Boaz	423
United States Co. ats. Young	331
V	
Vickery ats. American Co.	96
W	
Western Slope Association ats. Devine	368
Wilder ats. Oliver	337
Williams ats. George	400
Wood v. Yant	73, 189
Wright ats. Abernethy	239
Wyatt ats. Interstate Co.	217
Y	
Yant ats. Wood	73, 189
Young v. United States Co.	331

TABLE OF CASES CITED

Page

A

Abbott v. Monti, 3 Colo. 561 258
Abernethy v. Wright, 27 Colo. 239 349
Adams v. Colorado &c .Co., 49 Colo. 475 115
Adams v. Schiffer, 11 Colo. 15 393
Alvord v. McGaughey, 5 Colo. 244 514
Ames v. Partridge, 13 Colo. App., 407 107
Atchison v. Graham, 14 Colo. 217 167
Atlantic Co. v. Manning, 3 Colo. 224 446

B

Baisch v. Mueller, 53 Colo. 474 569
Barclay v. London Co., 46 Colo. 558 427
Beals v. Cone, 27 Colo. 473 496
Beaver Brook Co. v. St. Vrain Co., 6 Colo. App. 130 398
Becker v. Pugh, 17 Colo. 243 499
Bourke v. Van Keuren, 20 Colo. 95 371, 405
Bonfils v. Gillespie, 25 Colo. App. 496 224
Boulder v. Niles, 9 Colo. 415 211
Bowling v. Chambers, 20 Colo. App. 113 130
Brady v. People, 45 Colo. 364 500
Branham v. Stallings, 21 Colo. 211 244, 349
Breene v. Breene, 51 Colo. 342 43
Brewing Co. v. Barrets, 9 Colo. App. 341 371, 405
Brown's Estate v. Stair, 25 Colo. App. 140 261, 367
Buckingham v. Harris, 10 Colo. 455 5

C

Catlett v. Colorado & Southern Co., 56 Colo. 463 388
Cawker v. Apple, 15 Colo. 141 5
Chase v. Boulder Co., 37 Colo. 268 503
Chittenden v. Hill, 55 Colo. 65 500
Chittenden v. Nichols, 31 Colo. 202 185
Christ v. Flannigan, 23 Colo. 140 486
Clark v. Wallace, 51 Colo. 437 320
Clement v. Major, 1 Colo. App., 297 329
Colorado Co. v. Dunn, 18 Colo. App. 409 269
Colo. Con. L. & W. Co. v. Hartman, 5 Colo. App. 150 353
Colorado State Bank v. Davidson, 7 Colo. App. 91 330
Colorado Springs Co. v. Albrecht, 22 Colo. App. 201 133
Connell v. Schultz, 23 Colo. App. 194 349
Cooper v. German Bank, 9 Colo. App. 169 371
Cowell v. S. D. R. E. Co., 16 Colo. App. 108 309
Cree v. Lewis 49 Colo. 186 258
Crocker v. Burns, 13 Colo. App. 54 168

D

Denver Co. v. Cloud, 6 Colo. App. 445 297
Denver &c. Co. v. Domke, 11 Colo. 247 211
Denver v. Dunsmore, 7 Colo. 328 211
Denver Co. v. Gustafson, 21 Colo. App. 478 385
Denver Co. v. Holloway, 34 Colo. 432 518
D. & R. G. Co. v. Bedell, 11 Colo. App. 140 149
D. & R. G. Co. v. Sipes, 26 Colo. 17 320

	Page
D. & R. G. Co. v. Sullivan, 21 Colo. 302	286
Denver v. Murray, 18 Colo. App.. 142	107
Denver P. W. Co. v. Munger, 20 Colo. App. 56	354
Denver v. Pearce, 13 Colo. 383	474
De Votie v. McGerr, 15 Colo. 467	197
Divine v. Western Slope Association, 27 Colo. App. 368	410
Drake v. Justice Co., 32 Colo. 260	149
E	
Eisenhart v. Ordean, 3 Colo. App. 162	29
Empire Co. v. Bender, 49 Colo. 522	236
Empire Co. v. Lindenmeir, 54 Colo. 497	187
Eppich v. Blanchard, 58 Colo. 139	287
Evans v. Welch, 29 Colo. 350	397
F	
Fairbanks & Co. v. McLeod, 8 Colo. App. 190	222, 367
Farmers' Co. v. Wolf, 23 Colo. App. 579	543
Fechheimer v. Trounstine, 15 Colo. 386	216
Finch v. Turner, 21 Colo. 287	250
Finnerty v. Fritz, 5 Colo. 174	5
Fisk v. Greeley Co., 3 Colo. App 319	130
Fletcher v. Howell, 17 Colo. 94	486
Floyd v. Sellers, 7 Colo. App. 498	250
Fluke v. Ford, 35 Colo. 113	543
Fort Lyon Co. v. Chew, 33 Colo. 392	543
Fostoria Co. v. Hazard, 44 Colo. 495	119
French v. Deane, 19 Colo. 504	299
G	
Gates Iron Works v. Denver Engineering Co., 17 Colo. App. 15	376
Geraghty v. Randall, 18 Colo. App. 194	298
Greeley-Loveland Co. v. Farmers' Pawnee Co., 58 Colo. 462	486
Greeley Co. v. House, 14 Colo. 549	255
Guldager v. Rockwell, 14 Colo. 549	216
H	
Hagerman v. Bates, 5 Colo. App. 391	329
Hagerman v. Moore, 2 Colo. App. 83	514
Harris v. Harris, 9 Colo. App. 211	93
Hartford Co. v. Hammond, 41 Colo. 323	447
Hayden v. Patterson, 39 Colo. 15	393
Helvetia Co. v. Allis Co., 11 Colo. App. 264	447
Hendrie & Bolthoff Co. v. Collins, 13 Colo. App. 8	266
Hendrie & Bolthoff Co. v. Collins, 29 Colo. 102	266
Henry v. McNeal, 24 Colo. 456	540
Herfort v. Cramer, 7 Colo. 483	417
Herr v. Denver Co., 13 Colo. 406	267
Homestead Co. v. Reynolds, 30 Colo. 330	281
Houston v. Walton, 23 Colo. App. 282	245
Hubbard v. Mulligan, 13 Colo. App. 116	216
Hurlburt v. Dusenbery, 26 Colo. 240	371
Hurt v. Hubbard, 41 Colo. 505	168
Huston v. Plato, 3 Colo. 402	417

	Page
I	
Insurance Co. v. Lumber Co., 10 Colo. App. 236	442
Insurance Co. v. Smith, 10 Colo. App. 121	26
Irrigation Co. v. Water S. & S. Co., 39 Colo. 469	543
J	
Jackson v. Allen 4 Colo. 263	269
Jamieson Co. v. Brainard, 16 Colo. App. 509	261
Jenet v. Albers, 7 Colo. App. 271	222
Jennings v. Brotherwood, 44 Colo. 74	427
Jewel Co. v. Watkins, 26 Colo. App. 494	275
Jones v. McKenzie Bros. Co., 19 Colo. App. 121	266
K	
Kellogg v. Kellogg, 21 Colo. 181	258
King Co. v. Chittenden, 16 Colo. App. 441	262
Klepfel's Estate v. Klepfel, 41 Colo. 40	540
L	
Lambkin v. Travellers Co., 11 Colo. App. 249	446
Lamborn v. Bell, 18 Colo. 346	80
Lathrop v. Tracy, 24 Colo. 382	269
Lehman v. Lindenmeyer, 48 Colo. 304	107
Lewis v. Hughes, 12 Colo. 208	272
Lewis v. Mutual Life Co., 8 Colo. App. 368	35
Lilly v. Randall, 3 Colo. 298	417
Liss v. Wilcoxen, 2 Colo. 85	515
Little Dorrit Co. v. Arapahoe Co., 30 Colo. 431	107
Little v. Howell, 24 Colo. App. 128	236
Little Pittsburg Co. v. Little Chief Co., 11 Colo. 223	57
Loukowski v. Prior, 46 Colo. 584	26
Mc	
McConnell v. Schultz, 23 Colo. App. 194	245
McKercher v. Green, 13 Colo. App. 270	43
McVicker v. Rouse, 44 Colo. 255	500
M	
Manning v. Strehlow, 11 Colo. 451	498
Marshall Co. v. Kirtley, 12 Colo. 410	498
Mills v. Hart, 24 Colo. 505	93
Mosier v. Kershaw, 16 Colo. 341	371
Morris v. St. Louis Bank, 17 Colo. 231	237
Mustang Co. v. Hissman, 49 Colo. 308	133
N	
Nelson v. Garfield County, 6 Colo. App. 279	208
Nelson v. Nelson, 27 Colo. App. 104	418
Nicholas v. C. B. & Q. R. R. Co., 44 Colo. 501	386
Norman v. McCarthy, 56 Colo. 290	371, 405
O	
Omaha and Grant Co. v. Tabor, 13 Colo. 41	237
O'Rourke v. O'Rourke, 58 Colo. 300	486
P	
Paddock v. Staley, 13 Colo. 363	249
Page v. Yool, 28 Colo. 467	299
Painter v. Wilcox, 52 Colo. 639	57
Peck v. Peck, 33 Colo. 421	330
Peoples Co. v. Central &c. Corporation, 20 Colo. App. 561	329
People ex rel. v. Parks, 57 Colo. 458	43
Perot v. Cooper, 17 Colo. 80	204
Phoenix Co. v. Gregor, 39 Colo. 193	486

	Page
Preferred Acc. Ins. Co. v. Fielding, 35 Colo. 119	428
Prewitt v. Lambert, 19 Colo. 7	197
Price v. Immel, 48 Colo. 163	7
Price v. Kit Carson County, 22 Colo. App. 315	417
Pueblo v. Bradley, 23 Colo. App. 177	367
R	
Republican Co. v. Conroy, 5 Colo. App. 262	299
Reyer v. Blaisdell, 26 Colo. App. 387	261
Rhone v. Powell, 20 Colo. 41	35
Rice v. Williams, 18 Colo. App. 330	108, 418
Richardson v. Lamont Co., 19 Colo. App. 483	363
Rittmaster v. Brisbane, 19 Colo. 371	269
Robbins v. County Com'rs, 50 Colo. 610	503
Roberts v. Greig, 15 Colo. App. 378	371, 406
Roberts v. People, 9 Colo. 458	503
Robinson v. Canal Co., 2 Colo. App. 17	281
Roose v. Gove, 32 Colo. 522	250
Ross v. Hanley, 18 Colo. App. 204	5
Rudolph v. Rudolph, 50 Colo. 243	500
S	
Sagara v. Chicago &c. Co., 58 Colo. 236	385
San Juan County v. Tulley, 17 Colo. App. 113	569
Saxonia Co. v. Cook, 7 Colo. 569	557
Sayre v. Leonard, 57 Colo. 116	371, 405
Sayre v. Sage, 4 Colo. 559	236, 238
Schneider v. Wallingford, 4 Colo. App. 150	177
School District v. Johnson, 26 Colo. 433	301
School District v. Nash, 27 Colo. App. 551	70
Seyfried v. Knoblauch, 44 Colo. 86	354, 394
Silver Mountain Co. v. Anderson, 51 Colo. 298	367, 381
Speer v. Bordeleau, 20 Colo. App. 413	492
Stevenson v. Palmer, 14 Colo. 565	179
Stratton Co. v. Ellison, 42 Colo. 498	107
Stuart v. Asher, 15 Colo. App. 403	269
Sutton v. Dana, 15 Colo. 98	419
Sykes v. Kruse, 49 Colo. 560	309
T	
Tabor v. Salisbury, 30 Colo. App. 335	173
Talcott v. Mastin, 20 Colo. App. 488	269
Taylor v. Taylor, 10 Colo. App. 303	540
Tucker v. Tucker, 21 Colo. App., 94	261, 367
U	
U. P. Co. v. Postal Co., 30 Colo. 133	78
Union Pacific Co. v. Rainey, 19 Colo. 225	115
United States Co. v. O'Connor, 48 Colo. 354	370
Upham v. Weisshaar, 23 Colo. App. 277	399
W	
Warren v. Adams, 19 Colo. 515	237
Warren v. Hall, 20 Colo. 508	57
Wason v. Major, 10 Colo. App. 181	237

	Page
Weiland v. Potter, 8 Colo. App. 79	266
Weiss v. Ahrens, 24 Colo. App. 531	258
Wells v. Crawford, 23 Colo. App. 103	27
Whitehead v. Johnson, 51 Colo. 587	93
Wilson v. Mitchell, 48 Colo. 454	43
Wilson v. Morris, 4 Colo. App. 242	26
Wood v. Casserleigh, 30 Colo. 287	344

Z

Zang v. Adams, 23 Colo. 408	370

REPORTS

OF THE

DECISIONS OF THE

COURT OF APPEALS

OF THE

STATE OF COLORADO

January Term, 1915

[No. 4081.]

W. T. CRAFT REALTY COMPANY v. LIVERNASH ET AL.

1. LAND BROKER—*Authority.* A broker employed merely to find a purchaser for lands upon specified terms has no authority to execute a written contract of sale binding the land owner. (5.)

2 —— *Right to Commission.* To entitle the broker employed to find a purchaser of lands, to his commissions, it is not necessary that he should secure the execution of a contract binding the purchaser. (5.)

If the name and address of the proposed purchaser are furnished to the vendor, or, as it seems, if the name and address come to the vendor from other sources, in due season, so that he has opportunity to negotiate with him and secure a binding contract, the failure to secure such contract is not to be charged to the broker. (8.)

That no sale is completed does not affect his right, if the failure was without fault on his part.

The broker having, within thirty days after objections made to the title by the proposed purchaser, surrendered the deposit and contract of purchase made by such purchaser, without the knowledge or consent of his principal, and without informing his principal of a provision in the contract or offer of purchase, for the correction of defects in the title within a reasonable time, Bell, J., and Morgan, J., were of opinion that the broker was not entitled to his commission. (18, 19.)

3. VENDOR AND VENDEE—*Merchantable Title Implied.* One offering lands for sale without reservation as to the title impliedly warrants that his title is merchantable and without substantial defect. (7.)

4. APPEAL AND ERROR—*Presumptions—As to Evidence Considered Below.* It will not be presumed in favor of the party successful below that the trial court considered evidence which, upon his objection, was excluded. (8.)

Error to Denver District Court. HON. JAMES H. TELLER, Judge.

MR. W. W. DALE, for plaintiff in error.

MR. JOHN H. GABRIEL, for defendants in error.

KING, J., delivered the opinion of the court.

Plaintiff in error brought suit to recover from defendants a sum alleged to be due as commission earned under the following contract, dated July 28, 1910:

"In consideration of the agreement of The W. T. Craft Realty Co. hereinafter contained, I hereby give to said Company, for 120 days from this date, the exclusive agency for the sale of the property and for the price and terms described upon the reverse of this card, and agree to pay to said Company a full regular commission if the property is sold or exchanged through its agency or otherwise during said period, at the within price or any price accepted by me." (Signed by defendant Livernash.)

"We hereby accept the above agency and agree to use our best efforts to effect a sale." (Signed by plaintiff.)

The terms on the reverse side of the card were $3,350 for property in Denver therein described. The testimony offered by plaintiff and admitted was not disputed by defendants. It showed that plaintiff advertised the property for sale; that upon reading said advertisement, Felix A. Richardson called upon plaintiff, was shown the property, and advised of the terms given by defendant to plaintiff, and accepted the same, paid $100 to the agent to bind the bargain, and offered to pay in full within fourteen days, upon receipt of a deed and abstract showing good title, and that he was ready, able and willing to comply with the terms if the title to the property was found to be merchantable. This purchaser was found, and accepted the terms, on or about the 27th day of August. On the same day the defendant Livernash was notified of the sale, by

letter addressed to her at Fort Collins, Colorado, at which place she resided, advised of the cash deposit, and that the balance was to be paid on or before fourteen days, provided abstract should show title perfect and clear of encumbrance. In response to this letter, the defendant wrote, expressing satisfaction, advising the plaintiff that the abstract was in the hands of her attorney, Mr. John H. Gabriel, at Denver, where plaintiff could get it, and that thereafter "all papers can be handled through Mr. Gabriel, who will advise me." On the 9th day of September, upon examination of the abstract, Mr. Richardson's attorney found the title seriously defective, and so reported in a carefully written opinion, which was by plaintiff delivered to Mr. Gabriel. On the 13th of September plaintiff notified defendant of the attorney's report, and that the opinion had been delivered to Mr. Gabriel. The defect in the title which rendered it unmerchantable was admitted by defendants' attorney, who thereafter, at a time not disclosed, instituted proceedings to quiet title, which, it seems, at some later date, not disclosed, but prior to the trial in the district court, had resulted in a judgment quieting title. This cause was first tried in the county court, where judgment went in favor of plaintiff. Appeal was taken to the district court; trial there had on May 14, 1913, whereupon judgment was rendered in favor of defendant. Plaintiff offered in evidence a written agreement entered into on the 27th day of August, 1910, between the plaintiff and the said Richardson, embodying the terms and conditions upon which said Richardson agreed to take the property and make the payments. On objection of defendants' counsel, said agreement was excluded from evidence. Plaintiff excepted, but the exclusion of the agreement is not assigned as error.

Some time after receiving the opinion of his attorney, Richardson demanded a return of the sum deposited by him, but extended "for ten days or more" the time for examination of the title, and to ascertain whether the defect could

be cured. The evidence seems to show that the deposit was repaid to him on the 10th day of October, 1910.

Among other things, the complaint alleged that the purchaser procured by the plaintiff refused to accept the title "for the reason that the same was not a good and merchantable title, and could not be corrected within a reasonable time." Defendants, by answer, admitted that the title was defective, but denied that it could not be corrected within a reasonable time; alleged that said defect was unknown to defendants; that it was such that it could be corrected within a reasonable time; that as soon as they were advised of said defect they made every effort and exercised every diligence to correct the same, "and that the said title *is now being corrected and perfected.*" This answer was filed on the 26th day of April, 1912, one year and eight months after the purchaser was procured.

1. We think the judgment cannot be affirmed. We do not agree with the theory of the appellees upon the evidence admitted. The theory of the defense was stated by counsel as follows:

"It is based upon the fact that there was no contract entered into with us at all, nor was this purchaser ever produced to us. There was no sale within the rule of law. He (the broker) must either bring the proposed purchaser and the owner together, so that they may make a contract, or he must furnish the owner an executed contract, so that the owner can hold the purchaser. That is the ground upon which I stand entirely. As to this defect in the title, we have admitted that it was there, because we proceeded to correct it. I might say that we substantially admit everything here as to the evidence. We have no question that Mr. Craft found Mr. Richardson, and that Mr. Richardson was ready, able and willing to buy, but he never brought Mr. Richardson to Mrs. Livernash, the owner of the property; they never met or talked together about it; he did not produce to her any contract of any kind or nature; and

there was none signed of any kind or nature, so that he never, within that rule of law, ever produced the purchaser to the owner of the property."

We think that, within the rule of law as recognized in this state, there was a "sale" by the broker; that a purchaser was "produced" to the owner; that plaintiff was not required to secure the execution of a binding contract by the defendants and Richardson, and that plaintiff was entitled to judgment for for his commission, unless the sale so made failed of consummation through his fault.

The employment of the plaintiff as a broker, as evidenced by the written agreement quoted, is nothing more than an ordinary general employment of a broker "to sell" real estate upon terms proposed by the owner, and in which the broker was given an exclusive agency for a specified time. By such employment no power was given to the broker to execute a contract on behalf of the owner that would be binding upon her, nor was it given any other control over the property or its title. In law, the broker was employed only to procure a purchaser, and when, within the time fixed, it produced a purchaser ready, able and willing to buy on the terms stated by the owner, and acceptable to her, it performed its part of the agreement, and did all it was employed to do. *Buckingham v. Harris,* 10 Colo., 455, 15 Pac., 817; *Ross v. Smiley,* 18 Colo. App., 204, 70 Pac., 766; *Finnerty v. Fritz,* 5 Colo., 174; *Cawker v. Apple,* 15 Colo., 141, 25 Pac., 181; *Goodridge v. Holladay,* 18 Ill. App., 363. In order to satisfy a general contract of employment to sell real estate, it is not necessary that a broker shall secure the execution of a written or binding contract between the owner and the proposed purchaser. In *Buckingham v. Harris, supra,* the court cites with approval *Doty v. Miller,* 43 Barb., 529, in which the law is stated that a broker or agent who undertakes to sell property for another for a certain commission has earned and can recover his commission when he finds a purchaser willing to purchase

at the price, though the sale was never completed, if the failure to complete the same was in consequence of a defect of title, and without any fault of the broker or his agent; also *Delaplaine v. Turnley*, 44 Wis., 31, in which it was held that if a broker, employed to sell property at a price satisfactory to his principal, produces a party ready to make the purchase at a satisfactory price, the principal cannot relieve himself from liability to the broker. *Moses v. Bierling*, 31 N. Y., 462, in which it is said that a broker employed to make a sale is entitled to his commission when he produces a party ready to make the purchase; also *Hart v. Hoffman*, 44 How. Prac., 168, in which it is ruled that where a broker, employed to sell real estate, procures a party willing to purchase on the owner's terms, the broker has earned his commissions. After adopting the rule stated in these several cases, the supreme court sustained the trial court in the refusal of an instruction that the broker is not entitled to his commission until he has completed a valid contract of sale, binding upon both vendor and vendee, and held that in the general employment of a broker to sell real estate, the broker is given no power over the title, or control of the property itself; that the broker is employed only to procure a purchaser; that for the broker's use, the terms of sale alone are sufficient, and when he has procured a purchaser ready, able and willing to buy on those terms, he has performed his part, done all he can do, and all he was employed to do; and such seems to have been the uniform ruling of the courts of this state since that opinion was handed down. The settled construction put upon the general employment of professional brokers "to sell" or to "close a bargain" concerning real estate, is that such employment is authority to find a purchaser at the price named, and does not confer power upon the agent to execute a written contract binding upon the owner. *Duffy v. Hobson*, 40 Calif., 240, 244, 6 Am. Rep., 617; *Rutenberg v. Main*, 47 Calif., 213, 219; *Desmond v. Stebbins*, 140 Mass.,

339, 5 N. E., 150; *Ross v. Smiley, supra.* The agent is not required to do what he has no authority to do.

2. Upon the undisputed facts, the only reason the sale was not consummated was because the title to the property offered by defendants was not merchantable. The condition of the title was not known to the plaintiff at the time it procured the purchaser. It is the law in this state that when the vendor of property offers it for sale without reservation as to the character of the title, he impliedly warrants to the vendee that the title is good, merchantable, and free from substantial defects. *Price v. Immel,* 48 Colo., 163, 170, 109 Pac., 941. So, also, when the property is placed in the hands of a real estate broker for sale, and he does not know, at the time he contracts to sell the same, of the defect in title which ultimately defeats his efforts, he has the right to assume, and his principal impliedly warrants, that the title to the property he deals with is free from infirmity. *Berg v. San Antonio S. R. Co.,* 17 Tex. Civ. App., 291, 42 S. W., 647, 43 S. W., 929; *Gauthier v. West,* 45 Minn., 192, 47 N. W., 656; *Birmingham Co. v. Thompson,* 86 Ala., 146, 5 South,, 473; *Sweeney v. Oil Co.,* 130 Pa., 193, 18 Atl., 612; *Phelps v. Prusch,* 83 Cal., 626, 23 Pac., 1111; *Peet v. Sherwood,* 43 Minn., 447, 45 N. W., 859; *Gonzales v. Broad,* 57 Cal., 224. Consequently, if the plaintiff's efforts in this case were defeated because of the defect in the title, such failure was not through its fault, and it cannot thereby be deprived of its right to recover the compensation agreed upon. As between the plaintiff and the defendants, as well as between the defendants and Richardson, the defendants alone were responsible for the defect in title, and although they were ignorant of such defect, it is nevertheless regarded as through their *fault* that the sale was not completed. *Monk v. Parker,* 180 Mass., 246, 163 N. E., 793; *Goodridge v. Holladay, supra.*

3. Defendants in error contend that, under the evidence, the plaintiff did not find or procure or produce a pur-

chaser, within the meaning of those terms as applied to the finding, procurement or production of a purchaser, in contracts of brokerage, because (it is contended) it did not give the purchaser's name to defendant, or bring the defendant and the proposed purchaser together. The evidence shows that the first notice given by plaintiff to defendants did not contain the name of the purchaser, but that his name and address in Denver did come to the knowledge of defendants, and to their attorney, on or about the 12th day of September, and that they had ample opportunity after obtaining such notice, and before the deposit was withdrawn, and while Mr. Richardson was still ready, able and willing to purchase the property, to negotiate with him and demand such written contracts as might be necessary and binding, both upon vendor and vendee; and defendants' failure so to do cannot be charged to the plaintiff in this case. We think the evidence fully and conclusively establishes the allegations that plaintiff found, procured and produced to the defendants a purchaser ready, able and willing to purchase, and that the sale would have been consummated except for the defect in title. *Ross v. Smiley, supra,* fully supports this conclusion. In that case, the purchaser was in New York, and the owner in Denver, and it does not appear that they were in closer proximity during the negotiations. *Strout v. Kenney,* 107 N. Y. Sup., 92.

4. An issue seems to have been made by the pleadings upon the question of whether the admitted defect in the title could be or was cured within a reasonable time. The only evidence offered which seems to make that issue material is contained in the written agreement made between the plaintiff and Mr. Richardson, which agreement, we think, should have been admitted; but as that evidence was excluded (upon the objection of defendants' counsel), it cannot be presumed, in their favor, that the trial court considered such evidence, or based its finding and judgment upon a dispute as to what constituted a reasonable time.

Moreover, it is shown by defendants' answer that the title was still in the process of litigation one year and eight months after the purchaser had been produced; and, in the state of the record, this court is not prepared to say that the title was, or could be, cured within a reasonable time. Upon that question we express no opinion.

Reversed.

CUNNINGHAM, P. J., and HURLBUT, J., concur.

BELL, J., concurs specially.

MORGAN, J., dissents.

BELL, J., specially concurring:

I have read and re-read the opinion of the majority of the court in an endeavor to determine whether I should yield to rather well established precedents and join in a judgment which I am convinced carries injustice to the defendants in error, because, perchance, their counsel and the trial court confined the basis of the evidence upon which the judgment rests to limits not justifiable under our appellate court decisions. In other words, if we were permitted to consider the written contract between the plaintiff company and the prospective purchaser, which was wrongfully excluded by the court upon application of counsel for defendants in error, then I should not join in a judgment of reversal. The contract referred to was in writing and duly signed by the plaintiff in error and purchaser, and provided in part that:

"If title is not good as above mentioned, and cannot be corrected within a reasonable time, then this receipt (contract) shall be null and void, and the $100.00 paid this day to be returned to F. A. Richardson (the prospective purchaser);" and also stipulated that the $100 payment received on the purchase price was "taken subject to the approval of the owner."

On August 27th, 1910, the Realty Company wrote the defendants in error, in part, as follows:

"I have a deposit of $100.00 cash to bind the bargain on your house, 1821 Penn., the balance to be cash on or before ten days, provided abstract shows title perfect and clear of all incumbrance. Please send the abstract at once."

August 29th, 1910, Mrs. Livernash replied to the above letter as follows:

"* * * I am this day mailing the abstract of house at 1821 Pennsylvania to Mr. John H. Gabriel * * *, who has charge of my affairs, and upon whose advise I depend, and any question that may arise, he is able to answer, having attended to the title of the property when it was the estate of my mother, now deceased. The property now stands in the name of myself and two sisters, all of age, and I have asked Mr. Gabriel to have the abstract brought down to date, and if you will call at his office you may get it. I trust you will find it satisfactory, and if so, all papers can be handled through Mr. Gabriel, who will advise me."

September 13th, 1910, the company again wrote Mrs. Livernash, in part, as follows:

"I am sorry to inform you that our customer's attorney reports the title not merchantable. I have turned the attorney's opinion over to Mr. Gabriel, and I suppose he will report to you."

September 19th, 1910, the company further wrote Mrs. Livernash, in part, as follows:

"I have an inquiry for your house for rent. If it is going to take some time to fix up the title it might be well to rent the house until title can be fixed up so it can be sold. I am very sorry that Mr. Richardson's attorney could not pass the title. I still have some hopes that Mr. Gabriel and he will be able to patch the matter up in some way, but if I can rent the house, subject to sale, it seems to me it would be well to do so. Some of the rooms need papering pretty badly. The rooms in the rear are in the worst condition. The kitchen, two back bed rooms and bath room are pretty

badly smoked, but if they are done new the other three rooms will look very badly. If the house were papered and occupied I think it would be easier to sell it than vacant and in the condition it is, and it would not take the rent long to pay for repairs."

On September 21st, 1910, Mrs. Livernash replied to the above as follows:

"In reply to yours of the 19th inst., if you will furnish me an estimate on repairs for the house I will decide what to do. I have not heard from Mr. Gabriel since my husband's return from Denver, and have been in hopes he could make some arrangement with Mr. Richardson's attorney. However, Mr. Gabriel said it would take about ninety days to straighten that flaw in the title, and unless we had a cash deposit binding Mr. Richardson, I do not care about waiting on him, and would prefer to rent it subject to sale. We have always received $25.00 per month rent, and that is what I would ask, and leave it in your hands to collect each month, and if you can get it repaired cheap enough I would be glad to have the rent pay for it, as I have no ready money to put into it. As soon as I hear from you regarding estimates I will let you know what to do, as by then I expect to hear from Mr. Gabriel."

We hear nothing more of their arrangements or doings until the defendants in error are sued. The evidence shows that from 10 to 30 days after the attorney for the prospective purchaser reported some omissions or so-called flaws in the title, the company, without the knowledge or expressed consent of the defendants in error, returned the $100 payment to the prospective purchaser and surrendered the written contract of sale. It would seem, from the return of the purchase money and contract of sale by the company and the tenor of its letters regarding the renting and future sale of the house, that the parties mutually understood or were justified in understanding that the tentative sale was voluntarily abandoned by the agent and acquiesced in by the owners. It would seem if the agent wished to insist on

any benefits arising from its contract, it should have insisted upon that provision of the contract allowing the owners a reasonable time in which to correct any flaws or omissions in the title. The owners notified the agent, in ample time, that their attorney estimated that it would take about 90 days to correct the flaw. It was a proper matter for the court, under all the circumstances, to determine whether 10, 30 or 90 days were reasonable periods in which to correct and make good the title. The prospective purchaser testified that he demanded the return of his money in about 10 days after the defect was reported by his attorney, but that he would have taken the property at the same price within a reasonable time thereafter. There is no evidence whatever that the agent insisted upon a performance of that provision in the contract giving a reasonable time within which to correct the title; neither did it notify the owners that any such provision had been made or any such privilege extended to them in the contract. If the agent had fully informed the owners of the written contract he had made, and had insisted upon the sale he had contracted for being consummated, and had turned over the control of the $100 payment to the owners for their disposition, and had not abandoned and given up the only contract it had made for the sale and the purchase money received to bind it, then it might have had a legal claim for its services. To entitle a broker to a commission for selling real estate, he must show that he has completed the undertaking according to the terms of his contract, or that its completion was prevented, *without his fault*, by his principal. Mechem on Agency, Sec. 965.

The evidence in this case shows that the owners were anxious to sell, and, upon an objection having been urged to certain omissions in the title, their attorney immediately set about to have the defect corrected, and that the title was quieted in them at the time of the trial of this action. It is suggested in the opinion of the majority of this court

that it was not quieted at the time the suit was instituted or the answer filed; however, there is no evidence showing that it could not have been quieted within the estimated 90 days aforesaid if the agent had not voluntarily given up the partial payment and only contract it had made for a sale.

It will be borne in mind that the complaint in this action is most general in its terms, and, in aid of the complaint, there is filed in the case a bill of particulars which is in the form of a pleading, wherein, among many other things, the plaintiff in error alleges:

"That on or about said day (July 28th, 1910) the said defendants gave to the said plaintiff, for one hundred and twenty days, * * *, the exclusive agency for the sale of the property * * *, for the price of $3350.00, and agreed to pay said Company a full regular commission in case the property should be sold or exchanged through its agency or otherwise, during said period for that price or at any price accepted by them.

"That thereafter said defendants modified said contract and listed said property with the plaintiff for $3200.00 net, and employed the plaintiff to procure a purchaser therefor, and agreed to pay for its services, all that the property might sell for in excess of the said sum of $3200.00.

"* * * That the plaintiff entered into a written contract with the said Felix A. Richardson, dated August 27th, 1910, for the sale of said property at that price and received the sum of $100.00 as part payment therefor, which said sale was duly reported to the defendants and accepted by them, and an abstract of title delivered by defendants to plaintiff and by plaintiff to said purchaser. That thereafter the said Felix A. Richardson refused to accept the title to said property for the reason that the same was not a good and merchantable title and could not be corrected within a reasonable time, * * *."

The defendants treated this formal bill of particulars in aid of the complaint as a part of the complaint and specifically admitted certain allegations and denied other allegations in said bill of particulars, including the allegation that the title to the property "could not be corrected within a reasonable time."

Whether the allegations in the bill of particulars formally filed in this court as a part of the records of the case and treated by the parties as a part of the formal pleadings can be legally so considered, nevertheless, they may be considered in the nature of admissions of record in the case. The plaintiff in error alleged in said bill of particulars that a written contract for the sale of the property was made between it and the owners, and afterward modified, and that the title was found so defective that it could not be corrected within a reasonable time. However, there is not a particle of proof in the record to the effect that the title could not be corrected within a reasonable time. No one at any time indicated any doubt as to the equitable title being vested in the defendants in error. In fact, the evidence tends to show that they and their predecessors in interest possessed the property under a good faith claim under color of title for more than 20 years; therefore, a presumption of grant should be indulged. Also, the attorney of the proposed purchaser simply pointed out some omissions in the recorded title "as disclosed by abstract," and reported "The property appears to be owned by, and in possession of, three sisters, Mary E., Jennie L. (Livernash) and Margaret Gillis. While I would not say that the title is not good and sufficient to hold the property as against any outstanding claim or title, yet I do not consider it a good merchantable title;" and then shows that the probate of a will under which the defendants in error claim title that it was properly probated in Hamilton County, Ohio, that deeds were made and confirmed by the Ohio court, and that the will should also have been probated in Colorado, as the real estate is situated

here. The examiner of the title for the proposed purchaser admits that the probate of the will could be corrected, and then points out that "the will does not empower the executor, as executor, to convey the real estate," and especially that situated in Colorado, but says that it can be corrected in this state. The examiner of the title also admitted that there was a tax title to the premises, which may and probably does vest a title in the defendants' predecessors in interest, "which would protect the present owners against any other claim of title," but expresses his opinion that a tax title is never regarded as a merchantable one until adjudicated by a competent court. The examiner also found that "It is also probable that the present owners could successfully defend their possession under the statute of limitation," but holds that such a title is not merchantable until judicially determined by a court of competent jurisdiction. In other words, the examiner of the title, while finding the equitable title in the defendants in error, and such as would protect them in the possession of the property as against all others, he, nevertheless, held that, to make the title merchantable as understood in law, certain formal court determinations should first be had.

The general statement of the law in the opinion of the majority of the court, that when a broker procures a purchaser ready, able and willing to buy on the terms stated by the owner, and acceptable to him, he performs his part of the agreement, and does all that he is employed to do, if conceded to be the law, must always be taken with the qualification that the broker shall do nothing to defeat the purchase, or that the sale must not be prevented by the fault of the broker.

The Supreme Court of the State of Illinois states the rule in the following language:

"The duty of a broker, who is employed to sell real estate, is to find and produce to the vendor a purchaser who is ready, willing and able to complete the purchase as proposed. This he must do before he is entitled to any com-

missions. * * *. If the principal accepts the purchaser thus presented, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between them, the commission is earned. In such case, the broker has earned his commission, although the sale is never actually completed, if the failure of the purchaser to complete the sale results from the inability of the vendor to make a good title, and without fault on the part of the broker." *Wilson v. Mason,* 158 Ill., 304-310, 43 N. E., 134, 135, 49 Am. St., 162.

The court, in *Wilson v. Mason, supra,* continues by analyzing three lines of decisions on the rights of brokers, viz.:

"Some of the cases go so far as to hold that the broker is not entitled to his commissions unless the sale is actually accomplished by the delivery of the deed of the land from the vendor to the vendee, and the payment of the purchase money by the latter, or unless it is proven that the sale is prevented by the fault of the vendor. Other cases seem to hold that the broker is entitled to his commissions when the minds of the vendor and purchaser meet in a verbal agreement for the sale by the one and the purchase by the other of the land. We are not inclined to follow either of these classes of cases, regarding them as extreme and exceptional. The true rule is that the broker is entitled to his commissions if the purchaser presented by him and the vendor, his employer, enter into a valid, binding and enforceable contract. If, after the making of such a contract, even though executory in form, the purchaser declines to complete the sale and the seller refuses to compel performance, the broker ought not to be deprived of his commissions. He has done all that he can do when he produces a party who is able, and, in binding form, offers to purchase upon the proposed terms. An agreement by a real estate broker to procure a purchaser not only implies that the purchaser shall be one able to comply, but that the seller

and the purchaser must be bound to each other in a valid contract. So, where the agreement of the real estate broker is to make a sale, his commission is earned when a contract is entered into which is mutually obligatory upon the vendor and vendee, even though the vendee afterwards refuses to execute his part of the contract of sale or purchase," citing in support of the doctrine *Parker v. Walker,* 86 Tenn., 566, 8 S. W., 391; *Francis v. Baker,* 45 Minn., 83, 47 N. W., 452; *Love v. Miller,* 53 Ind., 294, 21 Am. Rep., 192; *Veazie v. Parker,* 72 Me., 443; *Willes v. Smith,* 77 Wis., 81, 45 N. W., 666; *Rice v. Mayo,* 107 Mass., 550; *Christensen v. Wooley,* 41 Mo. App., 53; *Love v. Owens,* 31 Mo. App., 501; *Greene v. Hollingshead,* 40 Ill. App., 195; *Short v. Millard,* 68 Ill., 292; *Kerfoot v. Steele,* 113 Ill., 610; *Ward v. Cobb,* 148 Mass., 518, 20 N. E., 174, 12 Am. St. Rep., 587.

In *Wilson v. Mason, supra,* the Illinois court continues as follows:

"An oral agreement upon the part of the purchaser of land would not be a valid agreement; and if he refused to complete the sale of the land after such oral agreement, without fault upon the part of the seller, the obligation of the broker would not be fulfilled, and he could not recover his commissions," and cites *Parker v. Walker,* 86 Tenn., 566, 8 S. W., 391; *Middleton v. Findla,* 25 Calif., 76; *Whitney v. Cochran,* 1 Scam., 209; *Christensen v. Wooley,* 41 Mo. App., 53; "nor would a written agreement be binding upon the purchaser of land, under the Statute of Frauds, if such an agreement were signed for him by some other person not lawfully authorized in writing to do so," citing *Cloud v. Greasley,* 125 Ill., 313, 17 N. W., 826; *McGinnis v. Fernandes,* 126 Ill., 228, 19 N. E., 44.

It would seem that the trial court and counsel for defendants in error were governed in their application of evidence by the principles announced in *Wilson v. Mason, supra.* The writer is not prepared to say that they were not justified. It would be unfortunate, indeed, if the highest

court of this state should unqualifiedly commit itself to the doctrine that a mere oral agreement between a broker and a proposed purchaser for the sale of realty, or an unauthorized written agreement, that was not enforceable against the purchaser, and never consummated, without fault on the part of the vendor, should entitle the broker to a commission. It is significant that practically all of the cases cited from our appellate courts awarding commissions on the mere finding of a purchaser ready, able and willing to buy on the terms specified were successful on the grounds that the vendor refused to carry out the agreement, or was unable to furnish a merchantable title.

In the instant case we think that the case turns upon the failure of the broker to complete its obligation by turning the purchase money and contract of sale over to the owner, instead of turning them back to the purchaser, and abandoning all it had accomplished in the negotiations.

We very much regret to be compelled to accede to a reversal for the technical reason that the written contract of sale was not formally admitted in evidence.

MORGAN, JUDGE, dissenting:

A real estate broker is entitled to a commission (under the decisions in this state, referred to in the majority opinion, and in the specially concurring opinion by Judge Bell), when he has produced a purchaser, ready, able and willing to buy on the terms proposed by, or acceptable to, the owner, even though a sale is not consummated, provided it was the owner's fault that a sale was *not* consummated. *Buckingham v. Harris,* 10 Colo., 455, and cases cited. And when the broker sues for a commission on a contract of employment, when a sale is not made, he should be permitted to prove that it was the owner's fault that a sale was not made; *Doty v. Miller,* 43 Barb., 529, 530; but if by his own evidence or the evidence of the owner it appears that the fault was his own, he cannot recover. This rule is clearly disclosed in *Buckingham v. Harris, supra,* on p. 457,

where it is quoted that the broker is entitled to his commission, "if the failure to complete the sale was in consequence of a defect of title, and *without any fault of the broker or agent.*" (Italics mine.) In this case the lower court was justified under the evidence in finding that the agent could not recover because it was his own fault that the sale was not consummated, although no findings were made in the record by the court in rendering the judgment. The agent in this case sustained the burden that was upon it, by proving that the owner's abstract disclosed a defective title, and that the owner was notified thereof; and, if the evidence had disclosed nothing more, it might be said it was the owner's fault that a sale was not made; but it appears that while the owner was, in good faith, preparing to perfect the title and carry out the sale, the agent returned to the purchaser his deposit together with the contract accompanying it, and let the purchaser go, without making any effort to hold him until the title could be perfected, or helping in any other way, after that, to consummate the sale; although the purchaser must have been willing to wait until the title could be perfected, as he testified that he was ready, able and willing to buy if the title had been good "for maybe sixty days" after the $100 was returned to him. It very frequently happens that a title is defective, and it always requires time to conclude a sale, and where an agent relies on his own arrangements with the purchaser, not effecting a binding contract between the purchaser and the owner, he ought to hold his purchaser "willing" for a sufficient length of time to permit the sale to be concluded. *Finnerty et al. v. Fritz,* 5 Colo., 174, 180. The agent may relieve himself of this duty to hold the purchaser, by effecting a binding contract between the owner and the purchaser. See also the specially concurring opinion, citing Mechem on Agency, Sec. 965.

The case of *Wilson v. Mason,* 156 Ill., 304, cited in the specially concurring opinion, and the authorities relied upon

by defendant in error, seem to hold that the binding contract must be effected to entitle the agent to his commission; but, while such contract would relieve the agent from his duty to hold the purchaser, it is not necessary under Colorado decisions, if the agent does hold him for such reasonable time as may be necessary to effect a sale. Neither this court nor the Supreme Court has ever held, except in the majority opinion, that an agent is entitled to a commission, where a sale is not made, by simply producing a purchaser, ready, able and willing to buy, without holding him in such condition or mood for a reasonable time, or else effecting a binding contract, except when the owner has prevented the sale, by some act or omission to act. The lower court must have found that the agent neither so held the purchaser nor effected the binding contract. The strongest case I have found against the owner in such instances states the rule as follows: "If the owner *refuses* or *declines* to *take any steps* to *remove* the *defect* or cloud, the agent is entitled to his commission the same as if he had consummated the sale." (Italics mine.) *Gerhardt v. Peck*, 42 Mo. App., 644, 651. The owner in the present case not only did not refuse or decline, but did remove the defect. The fact that she was slow in removing it makes no difference, because the agent's acts showed it was no longer interested in the matter, before a reasonable time elapsed for her to do it in.

The foregoing view of this case is upheld by the following statement in 19 Cyc., 257 to 270: "A broker employed to effect a sale or a lease of real estate is entitled to a commission, although the transaction fails of consummation because of a defect in the principal's title, provided that the *broker himself is not at fault.* * * *. The broker is not entitled to a commission under these circumstances, however, where the defect in the title *is not real and substantial, unless he has procured a valid contract from a solvent customer.*" (Italics mine.)

With due deference to the opposite view of the majority of my associates, I think the lower court was justified in finding that the agent abandoned the sale, and failed to hold his customer, either by his own efforts or by a binding contract, and that the judgment ought to be affirmed.

Decided October 13, A. D. 1914. Rehearing denied February 8, A. D. 1915.

[No. 4075.]

JONES V. DAPPEN.

1. LANDS—*Growing Crops* are part of the land, and though not mentioned pass by an absolute conveyance of the lands.

2. EQUITY—*Reformation of Writings—Evidence Required.* The evidence of a mutual mistake in a conveyance of lands, executed with due form and solemnity, must be clear, convincing, and free from reasonable doubt. (26.)

The evidence examined and held to be insufficient to establish the alleged mistake. (25-27.)

3. —— *Decree—Relief.* A writing may be reformed and judgment given thereon in the same action. (27.)

Error to Saguache District Court. HON. C. C. HOLBROOK, Judge.

MR. JAMES P. VEERKAMP, for plaintiff in error.

MESSRS. CORLETT & CORLETT, for defendant in error.

BELL, J.

This action was brought in the Saguache county District Court by plaintiff in error to recover the value of growing crops taken by defendant in error from 240 acres of agricultural land purchased by plaintiff in error from defendant in error by warranty deed on the 27th day of June, 1911. The case was tried to a jury and resulted in a ver-

dict and judgment in effect awarding growing crops to defendant in error. The parties herein entered into a written contract on June 21, 1911, wherein the defendant in error agreed to exchange said 240 acres of land in said county, with appurtenances and water rights, for the undivided interest of plaintiff in error in the Hunter Merc. Co. at Monte Vista, Colorado, including bills receivable estimated at $12,000. On June 22, 1911, defendant in error discovered that the bills receivable of said company were considerably in excess of said estimate, hence declined to be bound by said written agreement.

The parties negotiated back and forth and made divers modifications of the written contract up to the 27th day of June aforesaid, when the defendant in error executed and delivered a warranty deed to the plaintiff in error as per written stipulations and modifications aforesaid, without making any reservation whatsoever as to the future possession of the premises or ownership of the growing crops. In consideration of said deed the plaintiff in error transferred his said interest in said mercantile company, including said bills receivable, to the defendant in error, and delivered to him the immediate possession thereof. At the time of the first negotiations between the parties the premises conveyed were being cropped to grain, and the same was being irrigated. Soon after the exchange of said properties as aforesaid, the plaintiff in error made a trip to the state of Idaho, and left the harvesting and disposition of the crop with his agent, Mr. Olds. When the harvest season arrived the defendant in error and the agent of the plaintiff in error each tried to harvest the grain, and each harvested a portion thereof; but, to avoid possible personal conflicts, the agent of plaintiff in error withdrew from the work, and the defendant in error was notified that if he proceeded, it was at his peril. The defendant in error testified that he tended the crop, and looked after the same until the 5th day of August, 1911, before he learned that

the plaintiff in error claimed the same. After the grain was cut it was stacked by the plaintiff in error. The defendant in error had the grain threshed, and sold it and the pasture for $1,246.75. The defendant in error testified that he sold both the wheat and the oats for $1.25 per hundred, which was 6 cents per hundred under the market price.

The defendant in error might voluntarily sell his own property under the market price, but if he did sell the property of the plaintiff in error below the market price, then the law would hold him for the full market price thereof.

The following, among many other stipulations, appears in the written contract:

"Party of the second part hereby agrees to sell and convey to party of the first part, by a good and sufficient deed of general warranty, free and clear of all liens and encumbrances (except the lien of the indebtedness of the San Luis Valley Irrigation District thereon, within which the following described land is included and forms a part thereof) the North West quarter of section nineteen and the West half of the South West quarter of section eighteen, all in Township forty-one North, Range ten East of the New Mexico Principal Meridian, in Saguache County, Colorado, together with all water, water rights, ditches and ditch rights thereunto belonging; but said land is and shall be subject to such rights of way for roads and ditches as are now thereon and as the same are now located; * * *."

After much negotiation for a period of seven days, and modifications of the contract, and additional exceptions agreed upon, the written agreement, with the additional exceptions, were handed over to the attorney of the defendant in error, who was instructed by the defendant in error to draw a warranty deed in accordance with the terms of the written contract and subsequent exceptions, without in any manner reserving to the defendant in error the grow-

ing crops or the possession of the land for any length of time. The deed thus drawn, executed and delivered, granted to the plaintiff in error the land in question, together with all hereditaments and appurtenances, the reversions, rents, issues and profits, and all of the estate, right, title, interest, claim and demand whatsoever of the defendant in error, either in law or equity.

The defendant in error set up an equitable defense to the action to the effect that, through mutual inadvertence and mistake, no reservation was made in said deed of the crops and possession of the premises, but that it was the mutual understanding and intention of the parties that he should remain in possession of the premises until March 1st, 1912, and have the growing crops thereon, and further averred that on account of press of time and mutual mistake of the parties to the contract, and the scrivener thereof, the agreement relative to the possession of the crops and the premises by him as aforesaid was overlooked and omitted from the contract.

These allegations were denied in the replication, and the plaintiff in error, at the trial, introduced in evidence the written contract and the warranty deed executed and delivered in pursuance thereof, and other competent evidence showing his legal title to the premises and his right of possession from the date of the deed.

The defendant in error wholly failed to support the allegations of mutual mistake contained in his answer. He testified upon the trial that he asked to have such reservations of crops and possession of the premises included by the scrivener in the written contract, but that said scrivener objected because, he said, it would require an additional sheet of paper. He further testified that he read and reread the written contract from time to time between the 21st and the 27th days of June, the latter being the date upon which the deed was executed and delivered, and that he knew no such reservations were contained in the written

contract, and though he caused to be included in the deed reservations additional to those contained in the written agreement, he never mentioned or suggested to his attorney or to anybody else that such reservations relative to the ownership of the crop or the possession of the premises be included therein, and, therefore, no such reservations were made or included in the deed.

The scrivener, a young attorney of several years' practice, and the plaintiff in error each testified that there was no mention made of a reservation of the crops or possession of the premises, as testified to by the defendant in error, and the scrivener further testified that there was an abundance of space on the last page of the contract to include such reservations, had they been requested or desired.

There was other testimony introduced, including that of Perry Dappen and Ina Dappen, 13 and 11 years of age, respectively, children of the defendant in error, and another witness, all of whom tended to corroborate the testimony of the defendant in error to the effect that it was agreed, when the contract was being drawn, that the defendant in error should have possession of the land until the 1st of March, and the growing crops thereon, and the children, to the effect that it was left out to save putting in an additional page.

This testimony tends to disprove rather than to prove the allegation in the answer that the reservation was omitted through mutual inadvertance and mistake.

On the same day and at the same place that the contract was drawn and executed, the parties hereto had negotiations for another tract of land, wherein it was stipulated that the defendant in error should have possession of the premises then under consideration until March 1st, and the growing crops thereon; but this inchoate agreement fell through and was abandoned because of a tax complication.

If the testimony of the defendant in error and his witnesses, to the effect that the ownership of the crops and possession of the premises until March 1st were intended to be reserved in him, were pertinent, then it could have but little weight. Mr. Greenleaf, in Vol. 1, Sec. 200, of his work on Evidence, disposes of such statements as follows:

"With respect to all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. But where the admission is deliberately made and precisely identified, the evidence it affords is of the most satisfactory nature."

The evidence as to a verbal admission is not at all convincing in this case. It must be borne in mind that the defendant in error sets up affirmatively an equitable defense to the solemn provisions of a warranty deed to realty. In such a case he assumes the burden of proving that, by mutual mistake, a provision awarding him the growing crops and the possession of the property conveyed, to March 1st, 1912, was inadvertently omitted from the written instrument. It is not sufficient to prove this by a mere preponderance of the evidence, but the evidence must be most clear and convincing; *Wilson v. Morris,* 4 Colo. App., 242, 136 Pac., 248; *Loukowski v. Prior,* 46 Colo., 584-586, 106 Pac., 7; *Insurance Co. v. Smith,* 10 Colo. App., 121-131, 51 Pac., 170.

In *Insurance Co. v. Smith, supra,* where a policy of insurance in the name of E. H. Smith covered property

which belonged to his wife, Mary H. Smith, and it was sought to reform the policy on the ground of mutual mistake of fact, the court held that, unless the proof was clear, convincing and free from any reasonable controversy, the reformation could not be made.

The proper practice in a case like this is for the court to reform the written instrument by a decree of the court. The mere allegation and evidence of mistake in an action at law upon the covenants do not reform the instrument. The written agreement is still the contract between the parties until reformed. However, a reformation and judgment upon the instrument after reformation may take place in the same suit. The reformation of a written instrument is a question exclusively for the court, and when the court obtains jurisdiction for one purpose, it may grant complete relief. *Loukowski v. Prior,* 46 Colo., 584-587.

We do not know how this case properly reached a jury, but as no specific objection is urged to the form of the trial, we shall not search for one. However, the written instruments set up in the answer are controlling in this case, and no actual or theoretical change can be made therein upon a mere preponderance of the evidence, but must be made, if at all, on clear and convincing evidence manifesting certainty of error. 2 Pom. Eq. Jur., Sec. 589; *Wells v. Crawford,* 23 Colo. App., 103-108, 127 Pac., 914.

The verdict of the jury in this case is against the weight of the evidence, and should have been set aside. Therefore, the judgment of the trial court is reversed and the case remanded.

Reversed and remanded.

Decided November 9, A. D. 1914. Rehearing denied February 8th, A. D. 1915.

[No. 4044.]

READ V. W. T. CRAFT REALTY COMPANY.

1. APPEAL AND ERROR—*Verdict on Sufficient Evidence,* under proper instructions, will not be disturbed. (29.)

2. —— *Harmless Error.* An instruction, which, considered with the residue of the charge could not have misled the jury, will not, though open to criticism, entitle the defeated party to a new trial. (29.)

Error to Denver District Court. HON. JAMES H. TELLER, Judge.

MESSRS. MCKNIGHT & HENRY, MR. CARLISLE A. FERGUSON, for plaintiff in error.

MR. W. W. DALE, for defendant in error.

CUNNINGHAM, P. J., rendered the opinion of the court.

Defendant in error, as plaintiff below, had judgment against plaintiff in error, as defendant below, for $2,812.50. The action was based upon a claim made by the plaintiff for services alleged to have been rendered by it as a real estate agent for the defendant. It is clear that defendant's property was traded for other property; that plaintiff was instrumental in bringing about the trade so effected; that the terms and provisions thereof were satisfactory to the defendant; that he assented thereto, and thereafter made the trade in accordance therewith. There is no contention as to the amount of commission the plaintiff is entitled to collect or receive from defendant, if it is entitled to any commission whatever from him. There are no questions of law involved requiring our consideration. The sole contention made by the defendant is that the plaintiff did not represent him in the transaction, but that it represented the other parties to whom he, defendant, transferred his property. Neither under the pleadings or the proof is the question of a double commission raised; that is to say, there

is no allegation in the answer that the plaintiff received or was to receive any compensation from the party to whom the property of the defendant was transferred, and there was no attempt made by the defendant on the trial to prove that plaintiff received or was to receive any commission from his, defendant's, grantees; while the plaintiff's proof establishes that it in fact did receive no such commission, and that it had no arrangement with defendant's grantees, or their agent, whereby it was to receive, directly or indirectly, a commission from them.

Whether the plaintiff represented the defendant in the transaction whereby the latter's property was disposed of was sharply contested on the trial; indeed, as we have already said, this was practically the sole issue. This issue was submitted to the jury, under proper instructions, and they must, therefore, have found that the plaintiff did represent the defendant. There is evidence in the record sufficient to support such finding, and for this reason the judgment of the trial court will not be disturbed. No good purpose would be served by a discussion of the evidence offered by the parties on the trial.

Complaint is made by plaintiff in error of certain language used by the trial court in Instruction No. 5. After carefully considering the entire instruction, it is our opinion that although the same may not be entirely free from criticism, yet it could hardly have misled the jury, especially when the instructions are considered as a whole, and the jury were advised by the court that it was their duty to so consider all the instructions.

Judgment affirmed.

Decided December 14, A. D. 1914. Rehearing denied February 8, A. D. 1915.

[No. 4080.]

NEW ENGLAND ELECTRIC COMPANY V. SHOOK ET AL.

1. PROMISSORY NOTE—*Subscribed by Officers of a Corporation, with Their Title Affixed,* following the name of the corporation, and bearing the corporate seal, construed to be the undertaking of the corporation alone, although in the body of the note the makers were described by the words, "I, we, and each of us," and though there was no preposition following the corporate name. (33, 34.)

2. EVIDENCE—*Parol Admissible,* to show the real intent of the parties to a written contract, where upon its face an uncertainty as to such intent appears, *e. g.*, where following the name of a corporation, affixed to a promissory note appear the names of the president and secretary, followed by their respective titles. (34.)

3. ESTOPPEL—*By Record.* One who has admitted in his pleadings that a promissory note is the note of the corporation, the name of which is subscribed thereto, will not be heard to afterwards assert in the same action that the officers of the corporation subscribing it acted without authority and are therefore personally liable thereon. (38.)

4. PLEADING—*Amendments—Discretion.* Plaintiff's reply admitted that the promissory note which was the foundation of the action, was the note of a corporation, the name of which was subscribed thereto. It had presented the same note, as a claim against the corporation, in bankrupty proceeding, and had adduced sworn testimony to sustain it as such. *Held* it was not an abuse of discretion to deny its application to withdraw the admission containing the reply. (38, 39.)

Error to Denver District Court. HON. JOHN H. DENISON, Judge.

MESSRS. ZIMMERHACHEL & AVERY, for plaintiff in error.

MR. ISAAC PELTON, for defendants in error.

HURLBUT, J., rendered the opinion of the court.

This action was originally commenced in the County Court of the City and County of Denver on July 8, 1912, by plaintiff in error as plaintiff (hereinafter called plaintiff). Defendants recovered judgment in the County Court, from

which an appeal was taken to the District Court. The pleadings were the same in both courts.

The action is based upon a promissory note in words and figures following:

"Denver, Colorado, January 15, 1912.

$575.69.

One hundred and twenty days after date, for value received, I, we (and each of us), promise to pay to the order of The New England Electric Co. five hundred seventy-five dollars and 69/100 dollars at the office of the United States National Bank, Denver, Colorado, with interest at 8 per cent per annum from date until paid.

The makers and endorsers hereof hereby severally waive presentment for payment, protest, notice of non-payment and of protest, and agree to pay ten per cent additional as an attorney's fee, if collected by an attorney with or without suit.

The Akron Gas & Electric Co.,

(Corporate Seal.) R. A. Shook, President,

H. C. Black, Secretary."

The Akron Gas & Electric Company is not made a defendant, but the action is against Shook and Black as individuals. The complaint is short, pleads the note according to its legal effect, alleges its non-payment, and prays for judgment against defendants for the amount of the note and interest. The answer pleads four defenses: First, a general denial of every allegation of the complaint, except those expressly admitted; second, that neither of the defendants ever signed the note, as a personal obligation, but that the same is the note of The Akron Gas & Electric Company only, and was executed and delivered by that company for a debt due from it to the plaintiff corporation; third, that neither of the defendants ever received any consideration for the execution and delivery of the note, and that the same was executed and delivered by the Akron company in its corporate capacity solely, and not executed,

or intended or understood to be executed, by either of the defendants personally, and was given for a corporate debt due plaintiff, all of which plaintiff well knew at the time of its execution. The fourth defense is equitable in its nature, averring in substance that defendants executed the note as president and secretary of the Akron company, and that, through a mutual mistake on the part of plaintiff and defendants, the latter failed to execute the same unequivocally as the note of said company; and that the note should be reformed so as to express the true intent and meaning of plaintiff and defendants, to wit, an obligation of the Akron company alone. Replication was filed by plaintiff, in which, among other things, it was admitted that the said Akron company was one of the makers of the note; that the note was given exclusively for a debt due plaintiff from that company; and further alleged that, prior to the time the note was signed, defendants were in no way indebted to the plaintiff company.

The case was tried to the court without a jury, and at the close of the trial judgment was rendered in favor of defendants.

The record presents but one controlling question for determination, and that is: Was the note the obligation of the Akron company solely, or were Shook and Black personally liable thereon?

Plaintiff's position is that the note on its face conclusively shows both Shook and Black to be personally bound for its payment; and in support of such position it contends that the phrase found in the body of the note, "I, we (and each of us)," shows beyond a doubt a plurality of signers or makers, and to hold that the corporation only was liable, would be to ignore the plain meaning of the phrase, and contradict the clear intention of the parties to the note as expressed thereby; and, further, that the absence of the word "By," "Per," or a similar term, just after the corporate name, and before the names of Shook

and Black, clearly manifests an intention on their part to personally bind themselves as makers. It is useless to deny that this position of plaintiff is supported by reputable authority, and particularly by the earlier English cases, but it is also true that such a position is vigorously condemned by authority of equal repute, including well known text-writers. Our attention has not been called to any decision of our own appellate courts passing on the question under discussion, and, knowing of none, we feel free to follow that line of authority which impresses us as being the most equitable, fair and reasonable. By adopting this course we find no difficulty in following the authorities last referred to, which hold to the rule that, in interpreting a note such as the one before us, the words "President" and "Secretary," immediately following the individual names signed, should not be rejected as surplusage, or considered *descriptio personae,* unless it be clearly manifested from a plain reading of the entire note, giving the words used their common and customary meaning, that such parties intended thereby to personally bind themselves as makers. If the note be so read, how can it be reasonably said that there is any ambiguity, uncertainty or doubt, upon the face of the note, as to the intention of Shook and Black in signing the same? Immediately following the context of the note is the full name of the corporation, "The Akron Gas & Electric Company," directly under which is signed the names "R. A. Shook, President," and "H. C. Black, Secretary," with the corporate seal attached, opposite their names, to the left. A corporation, as such, cannot write a word or do any other physical act. When business necessity requires its name to be subscribed on paper, it can only be placed there by and through its officers or representatives. It is a custom of universal practice in the present day for those who sign the name of a corporation to any business or other document, with the intent to bind the corporation only, to append to the corporate signature their own names, or initials,

with their official titles, intending thereby to characterize such signing as an act of the corporation only. Such is the common understanding throughout the business and commercial world, and it would seem reasonable for a judicial tribunal, when called upon to interpret a note or other written document so signed, to recognize such custom and give it full force and effect. In the instant case we have no hesitancy in saying that the note, with the impression of the corporate seal, when considered as a whole, is free from ambiguity, and shows upon its face that it is the note of the corporation only; and that neither Shook nor Black had any intention, in subscribing their names thereto, other than to do so as officers of the company, with the sole purpose of binding it alone to the payment thereof. From what standard of reason or common sense can it be maintained that because the word "By," "Per," or some similar term, is not written before the names of Shook and Black, or because of the existence of the phrase above quoted, the plain intention of the signers of the note, as appears from the whole context and form of the signatures, should be ignored and held for naught, when it is manifest that the obligation was solely that of the company? Nor do we see any force or reason in the suggestion that, because of the absence of the word "By," etc., or because of the existence of such phrase in the body of the note, the words president and secretary, following the names of Shook and Black, should be held as *descriptio personae.* It is the common custom, and so understood, at least in this country, that if a person intends to execute a promissory note in his individual capacity, and thereby bind himself personally, he simply signs his name, and that is the end of it. We venture the statement that it would be a positive curiosity, in this day and age, to find a promissory note, signed by individuals, as individuals only, with descriptive words, such as appear on the note before us, appended to the signatures. In the early practice of the common law in England there was a general custom

in vogue for individuals signing written documents to add to their signatures some title, or abbreviation, which indicated their social or political standing; but no such custom appears to have ever prevailed in this country.

If it be said that our interpretation of the note in issue is not warranted from a fair construction of the context, then the question arises: Does it, on its face, fairly show ambiguity or uncertainty of intention on the part of the signers, or does it not; and, if it does, is evidence admissible to show the real intent of the parties at the time it was executed? We find the authorities in conflict on this point also. The general trend of authority, including Colorado, supports the affirmative. *Rhone v. Powell*, 20 Colo., 41, 36 Pac., 899; *Lewis v. Mutual Life Ins. Co.*, 8 Colo. App., 368, 46 Pac., 621. In the case at bar plaintiff admits in the complaint, and its witness Lawrence testifies, that the Akron company was one of the makers of the note. The proof shows that after the note was executed and delivered the Akron company was adjudicated a bankrupt, and plaintiff presented the note to the referee in bankruptcy as a claim against that company. Plaintiff's conceded agent, J. L. Cain, who was expressly instructed to collect the indebtedness, testified in his deposition that he was instructed to collect the money due, if possible, or, failing in this, to secure a personal note from Shook and Black; or, if unsuccessful in this, to obtain the company's note for the claim; and that in pursuance of such instructions, having failed to get the money, he solicited a note from Shook and Black personally, but both flatly refused to execute it, offering, however, to execute the company's note for the indebtedness, whereupon he accepted their offer and obtained the note in issue, with the understanding that it was executed by them solely as a company note, and not in any way as a personal note on their part. This testimony is corroborated in every particular by the testimony of both defendants. The only evidence tending to disprove such testimony was the testimony

of an attorney for plaintiff, who testified that Cain made a statement to him, on the street, to the effect that at the time he (Cain) obtained the note from Shook and Black nothing was said by them or him about their not being personally liable on the note. The court found on this issue in favor of defendants, which is binding upon us.

There is another feature of the case which it might be well to mention, and that is, the corporate seal of the Akron company was impressed on the note. There is a line of authorities holding that a corporate seal on a note similar in form and language to the one before us is a strong circumstance tending to show that the note is that of the corporation only, and not of the individuals whose signatures are followed by their official titles. In *Guthrie v. Imbrie,* 12 Ore., 182, 6 Pac., 664, 53 Am. Rep., 331, the court had under consideration a note reading as follows:

"For value received, we promise to pay to David Guthrie, or order, ninety days after date, five hundred dollars in U. S. gold coin, without interest.

James Imbrie, Prest.,
J. J. Imbrie, Sec. G. M. Co."

The note bore impression of seal reading "Granger Market Co., Portland, Oregon, November 4, 1874." The court held the note to be that of the company only, and not the individual note of the signers. To the same effect: *Means et al. v. Swormstedt,* 32 Ind., 87, 2 Am. Rep., 330; *Scanlan v. Keith,* 102 Ill., 634, 40 Am. Rep., 624; *Musser v. Johnson,* 42 Mo., 74, 97 Am. Dec., 316. This last case is referred to in Thompson on Corporations, Vol. 4, Sec. 5144. The following cases involve the interpretation of notes similar in form and phraseology to those considered in the Missouri, Indiana and Illinois cases cited, except that the corporate seal was absent.

In *Liebscher v. Kraus,* 74 Wis., 387, 43 N. W., 166, 5 L. R. A., 496, 17 Am. St., 175, the court construed a note

identical in form and import with the one in issue. It reads as follows:

"Milwaukee, January 1st, 1887.

$637.40.

Ninety days after date we promise to pay to Leo Liebscher, or order, the sum of six hundred and thirty-seven dollars and forty cents, value received.

San Pedro Mining & Milling Company,
F. Kraus, President."

The court held the note to be that of the corporation alone. The action was against both the company and Kraus. The latter pleaded a like defense to that pleaded by defendants in the instant case. See also 7 *Cyc.*, 553, *et seq.*, and *Latham, Adm'r, v. Houston Flour Mills et al.*, 68 Tex., 127, 3 S. W., 462.

In *Scanlan v. Keith, supra,* it was held, in considering a note quite similar to the one before us, that the corporation alone was bound, the court saying in part:

"Most generally there is that on the fact of the instrument itself, and especially where the execution is witnessed by the seal of the corporation attached thereto, that indicates unmistakably it is the obligation of the corporation. It is seldom anyone takes such paper under the belief it is the obligation of the officers executing it on behalf of the corporation. But parol testimony is admissible to establish the facts, collateral though they may sometimes be, that will make it appear past all doubt whose obligation it is. * * * It is inconceivable a person familiar with the business transacted by a corporation, taking a note executed by its officers under its corporate seal, should believe he was obtaining the individual note of the officers whose names are attached to it. It needs no extrinsic evidence to show such a note is the obligation of the corporation. Such is the common understanding from what appears on the face of the instrument itself. A most unreasonable conclusion it would be to hold that a secretary of a corporation who

attests such an instrument by his signature and the corporate seal, thereby becomes a joint maker. That is precisely the case here. * * * The same reasoning applies with equal force to defendant, who made the note as president of the corporation, in connection with the secretary, using the seal of the corporation. * * * Dealing with the corporation and taking a note made by its officers, with its corporate seal attached, it is most improbable plaintiff supposed he was obtaining the individual note of the officers. * * * It is still more unusual that persons making an individual note or other obligation would cause it to be attested by the seal of the corporation with which they are connected."

Also in point: *Miller v. Beach,* 150 Mass., 140, 22 N. E., 634, 6 L. R. A., 71; *Falk v. Moebs,* 127 U. S., 597, 32 L. Ed., 266, 8 Sup. Ct., 1319; *Draper v. Massachusetts Steam Heating Co.,* 5 Allen (Mass.), 338; *Lacy v. The Dubuque Lumber Co.,* 43 Ia., 510; Cook on Corporations, Vol. 2, 5th Ed., Sec. 724.

Plaintiff also contends that Shook as president had no authority to bind the Akron company by giving the note; therefore, both he and Black were personally liable for its payment, under a rule of law, as claimed, that, where individuals attempt to consummate a contract on behalf of their principal, and fail in that regard, they become personally liable upon the contract. If such be the law, plaintiff is not in any position, under the record showing here, to invoke the rule. After admitting in its pleading that the instrument was the corporate note of the Akron company, and after submitting it to the brankruptcy court as a lawful claim against that company, and after adducing sworn testimony in its own behalf to prove that fact, plaintiff should not be heard now to say that the instrument is not and never was the note of the Akron company. Plaintiff may say, however, that at the trial it moved the court for permission to amend its replication by withdrawing therefrom

its allegation that the note was that of the company, and substituting therefor a denial of that fact on information and belief, which motion was denied by the court. With such a state of facts before the trial court we see nothing that suggests error in its denial of the motion and are unable to perceive wherein it abused its discretion in so ruling.

We discover no error in the record. The judgment will therefore be affirmed.

Judgment affirmed.

[No. 4019.]

THE PEOPLE EX REL. V. BOLTON.

1. INFANT—*Custody—Statute Construed.* Every child is under the control of the state. In disposing of the custody of a child, the paramount consideration is the child's welfare, to which even the paternal right must yield. (43.)

The statute confers upon the guardian no greater right to the custody of his ward than had the parent at common law. (42.)

The issuance of letters of guardianship on *ex parte* application is not such an adjudication as to conclude the courts from depriving the guardian of the custody of the ward. (43.)

2. —— *Religious Training—Statute Construed.* Notwithstanding the provisions of the statute (Rev. Stat. Secs. 559, 2912-2914, Laws 1913, 694), the wishes of the parent as to the religious training of the child are subordinated to the controlling consideration of the child's welfare. (44.)

3. APPEAL AND ERROR—*Findings on Conflicting Evidence.* Proceedings in *habeas corpus* for the custody of a child are an exception to the general rule that findings of fact will not be disturbed in the court of review, unless manifestly against the weight of evidence.

The testimony being substantially in equipoise, the court refused to disturb the findings of the trial court.

4. —— *Harmless Error*—Habeas Corpus for the Custody of an Infant. The court below declining to commit the child to the custody of the guardian failed to order that the respondent should, in its religious training, conform to the expressed wishes of the deceased parent. *Held,* in view of the declared willingness of the respondent to comply with the parent's wishes, and that the court below might at any time, upon application, make the order, the error was not fatal. (45.)

Error to Denver District Court. HON. JAMES H. TELLER, Judge.

MR. JOHN H. REDDIN and MR. PATRICK D. CONNOR, for plaintiff in error.

Mr. GEO. B. CAMPBELL, for defendant in error.

KING, J., delivered the opinion of the court.

This is a habeas corpus proceeding, involving the right to the custody of Mary Flannery, a minor child, as between its legal guardian (the relator herein) and the respondent. Relator's petition was denied, and the custody of the infant awarded to the respondent.

The essential facts are as follows: At the time this proceeding was instituted the child was about five years of age. Its parents were dead. Relator was paternal uncle of the child, and the duly appointed, qualified and acting guardian of its person and estate. The mother died when the child was about nine months old. Thereupon the father delivered the child to respondent, who received it into her family, and thereafter retained and cared for it, for which the father paid her $7.50 per month. In October, 1912, the father demanded the possession of the child, and, upon refusal of the demand, he brought suit in habeas corpus. While the suit was pending and undecided, although after much evidence had been taken, the father died; whereupon the relator herein, having been appointed guardian, commenced this suit. It was the purpose of the father, and also of the guardian, to secure possession of the infant, in order to place it in St. Clara's Orphanage, an institution conducted by the Franciscan Sisters, a Sisterhood in the Roman Catholic church, to the end that, in addition to receiving care and a common education, it should be educated in the principles of that church, to which its parents belonged; taught to respect the religion which they professed, and hold to

the faith by which they lived and in which they died.

Respondent's chief defense to the petition was that the change of custody would be detrimental to the interests of the child, and that its welfare would be best promoted by remaining in her custody and under her care. The evidence shows that St. Clara's Orphanage is one of the best institutions of that kind maintained by the Catholic church, situated in a healthful location, well equipped, under the charge of a suitable number of Sisters, maintained in part by contributions from relatives of the inmates and in part by others charitably disposed; that the girls received in the institution are comfortably clad, have proper food, receive a common school education and thorough religious training in the tenets of the Catholic church; that if both parents are dead, and there is no legal guardian, girls at the age of twelve or thirteen years are, by the influence of the Sisters, "adopted into" Catholic homes. The estate of the infant consisted of an interest in real estate, inherited from its father, and some insurance on his life, of which it was beneficiary. Respondent has a husband and three children, a comfortable home, and the income from the husband's labor is sufficient to support the family. At the request of both the father and the mother of the child, the respondent took charge of the infant. At the time it was in very delicate health, and greatly in need of a mother's care. It is in evidence that respondent cared for it as if it had been her own child, and, because of its delicate health, gave it more attention than she had given her own. In deference to the wishes of the parents, she took it to a Catholic priest for baptism and other ceremonies peculiar to that church, and expressed a willingness to have it reared in that faith. Testimony in her behalf, some of which was of an expert medical character, tended to show that the child was undersized, frail, and of uncertain appetite, required special diet; that it was greatly attached to respondent, who reciprocated its affection; that the change in surroundings and separa-

tion from its foster mother would be detrimental to the interests of the child. This medical testimony was strongly combatted by testimony of Dr. Carlin, physician to St. Clara's Orphanage, who was acquainted with the infant and its parents, and with the treatment accorded inmates of the orphanage.

The plaintiff in error contends for reversal of the judgment upon three main propositions: (1) The relator, as guardian of the person and the estate of the child, is entitled to her custody under the statutes of this state and the law; (2) the law and the evidence on the question of the child's welfare require that the guardian be given its custody; (3) the civil and the moral law require that the wishes of the child's parents in regard to its religious training be respected and enforced when the courts are called upon to award its custody.

1. The statute provides that guardians shall educate their wards, and that for the purpose of the education and nurture of the ward the guardian shall have power, under the direction of the County Court, to direct the same; and further provides that should the guardian refuse or neglect to so educate his ward, the court shall have power to put out the ward to some other person for the purpose of its education. Under this statute, upon production of letters showing that he was the duly appointed guardian of the person and the estate of the infant, relator, *prima facie*, was entitled to the custody of his ward, and it was his duty to take it into his custody for the purpose of its ducation and nurture, and to direct the same. Counsel for relator contends that under these statutes and letters of guardianship, the District Court is powerless to deprive relator of the custody of his ward and award it to the respondent; that the issuance of the letters constitutes an adjudication as to the right of custody. With that contention we do not agree. The statute confers no greater right, power or duty over the ward than the parents had at common law and

under the statute to the custody and control of their offspring. In this jurisdiction it has long been held that every child is under the control of the state, and even the paternal right to its custody and control must yield to the interests and welfare of the child, and that the paramount and controlling question by which courts must be guided in proceedings affecting the custody of the infant is the interest and welfare of the child. *McKercher v. Green,* 13 Colo. App., 270, 58 Pac., 406; *Wilson et al. v. Mitchell,* 48 Colo., 454, 111 Pac., 21, 30 L. R. A. (N. S.), 507; *Breene v. Breene,* 51 Colo., 342, 117 Pac., 1000; *People ex rel. Broxholm v. Parks,* 141 Pac., 994. We think the right of the guardian to the custody of his infant ward is subject to the same limitations, herein announced, as are the parent's. Moreover, we do not regard the issuance of letters of guardianship, on an *ex parte* application, as an adjudication of the right to the custody of the ward that concludes the court in this case from depriving the guardian of that custody in the interests of the welfare of the ward.

2. The trial court found, as a fact, from testimony which it deemed sufficient to sustain it, that the child's interest, welfare and happiness would be best promoted and subserved by leaving her in the home of the respondent. This finding was based in part upon the further findings of fact that the child is delicate, under the normal size, and requires special attention as to diet; that respondent has provided, and is able and willing to continue to provide, a comfortable home for the child, with healthful and moral surroundings, where she has been and is surrounded by strong affection and constant and loving care. The court was of the opinion that these considerations are not overcome by, but are of greater weight than, the fact that the religious training in the orphanage would be more thorough than the training promised by the respondent. Notwithstanding the fact that cases of this character are an exception to the usual rule that the findings of fact of the trial

court will not be disturbed on appeal unless manifestly against the weight of the evidence, and the further fact that the evidence in this case seems to be very evenly balanced, so that if the trial court had found for the relator instead of the respondent, its judgment would not be disturbed, we do not feel justified in reversing the trial court in the finding made.

3. The third assertion of counsel, to wit, that the civil and moral law require that the wishes of the child's parents in regard to its religious training be respected and enforced when the courts are called upon to award its custody, cannot be successfully denied. It is expressly provided by our statute that the surviving parent may, by deed or last will, dispose of the custody and tuition of his child during its minority, and that such disposition shall invest in the person or persons named by the parents all the rights, powers, duties and obligations of a guardian of such minor, and that such testamentary guardian may maintain all proper actions for the wrongful taking or detention of such ward Sections 2912, 2913 and 2914, R. S. '08. The right to the disposition of the custody, tuition and nurture of a minor as provided for in said statutes, and the duty of the enforcement of such right by the courts, has been recognized to the extent that, in the absence of testamentary disposition, the expressed or presumed wishes of the parents in this respect, including religious training of the minor, has been enforced with great uniformity. *Cozine v. Horn,* 1 Brad. Sur. (N. Y.), 143; *Matter of de Marcellin,* 24 Hun. (N. Y.), 207; *Matter of Turner,* 19 N. J. Eq., 433; *In re Doyle,* 16 Mo. App., 159; 29 *Cyc.,* 1600. The same principle is incorporated into other provisions of the statute. Section 559 R. S. '08 says:

"In providing guardianship under the terms of this act for any dependent child the court may, as far as practicable, provide such guardianship as conforms to the religious faith of the parents of the child."

And in the Mothers' Compensation Act. Session Laws 1913, p. 695, it is provided that:

"Petitions and commitments under this act shall state the religious belief of the parents, if known, and if not known the court shall endeavor to ascertain such fact, and family homes to which children are committed shall, as far as practicable, conform to such religious belief."

Nevertheless, all of these provisions of the statute and rules of the common law are subject to the paramount and controlling question of the welfare of the infant, and cannot prevail to reverse the judgment, unless the finding of fact of the trial court as to the welfare of the child shall first be reversed.

4. Counsel further contends that the court committed reversible error by failing to specifically order that respondent carry out the wishes of the parents as to the religious education of the child. Such an order might well have been incorporated in the judgment, but in view of the expressed willingness of the respondent to comply with such wishes, and the evidence that she had, to some degree at least, so complied, and because the infant is still under the charge and control of the proper court, which may make further orders if its powers are suitably invoked, we think the failure of the court to make such order, if error at all, is not fatal.

Judgment affirmed.

[No. 4086.]

HOWARD V. MITCHELL.

1. EXECUTION—*Against the Body.* Under Rev. Stat., secs. 3024, 3025, no execution can go against the body unless, (1) the jury by their verdict declare that the defendant was guilty of fraud or wilful deceit, nor (2) unless the court has entered upon its docket the term for which the defendant may be committed. (50.)

2. DECEIT—*False Representations Made at the Instance of Another*, and without knowledge of the facts on the part of the one making them, do not estop him to assert their falsity, as against the person at whose instance the representations are made. (51.)

3. APPEAL AND ERROR—*Harmless Error—Action for Deceit.* The court charged that if the jury should find for the plaintiff they should also state in their verdict that defendant was guilty of fraud and wilful deceit. There was no entry upon the docket of the court of the term for which the defendant might be committed, and no order of commitment. *Held* that the error in the instruction was harmless. (Laws 1911, c. 6, sec. 20.) (50, 51.)

4. —— *Abstract.* Where the abstract sets forth only the single instruction complained of it will be presumed that the others given properly stated the law. (49.)

Error to Denver District Court. HON. JOHN H. DENISON, Judge.

MR. CARL H. COCHRAN, for plaintiff in error.

MR. WM. H. TEBBETTS and MR. HERBERT M. MUNROE, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

Complaint filed January 23, 1909. The action is in the nature of one for damages, on account of fraud and deceit, based upon alleged false representations made by plaintiff in error (defendant below), which induced plaintiff Mitchell to exchange certain lots, with improvements, and a stock of merchandise, owned by him, in the town of Golden, for agricultural land owned by defendant in Delta county, Colorado.

The complaint alleges in substance that on or about December 16, 1907, plaintiff and defendant entered into a contract whereby plaintiff purchased from defendant about 37½ acres of agricultural land situate in Delta county, Colorado, and paid for the same in money and property in accordance with the contract; that defendant represented to plaintiff that the property (herein called the ranch) con-

tained 37½ acres of good tillable land, which was enclosed with a good wire fence; that the same was rented (1907) for $500 per year; that at the time of the exchange there were planted on the ranch ten acres of sugar beets, five acres of potatoes, one acre of alfalfa, one acre of garden truck, and one acre of orchard, the balance being grass land; and that the value of the ranch and improvements was $6,000; that each and all of said representations and statements were false, and fraudulently made by defendant for the purpose of inducing plaintiff to exchange his said property in Golden for defendant's ranch; that such allegations were known by defendant to be false at the time he made them, and were made by him with the intent and purpose of cheating, defrauding and deceiving plaintiff; that, instead of the ranch renting for $500 per year, it was never at any time rented for a sum exceeding $200 per year, and never had a rental value in excess of that amount; that the actual market value of said land, instead of being $6,000, did not exceed the sum of $2,000; and that, instead of the 37½ acres, constituting the ranch as represented, being of a deep sandy loam, only about 13 acres possessed that character. It is further alleged in the complaint that defendant, at the time he made such representations to plaintiff, also represented to the latter that he had personal knowledge of the character, quality and condition of the land constituting the ranch, and made such representations upon his own personal knowledge; and that plaintiff had no personal knowledge of the character, quality and condition of the land constituting the ranch, and believed and relied upon the said representations of defendant, and was induced thereby to make the exchange aforesaid. The complaint closes with a prayer for $4,000 actual damages, $2,000 exemplary damages, and for a body judgment.

An answer and cross-complaint was filed by defendant, putting in issue all the material allegations of the complaint; pleading by way of defense certain alleged false

and fraudulent statements and representations claimed to have been made by plaintiff to defendant at the time and prior to the exchange, concerning the amount of incumbrance upon the property, and the quality, amount and value of the stock of merchandise; and praying for judgment against plaintiff in the sum of $1,429 actual damages, $1,000 exemplary damages, and for a body judgment. The allegations of the answer and cross-complaint were put in issue by a replication duly filed by plaintiff.

The case was tried to a jury, and a large amount of testimony taken, which was conflicting upon all material issues of fact. The jury returned the following verdict in favor of plaintiff:

"We, the Jury, find the issues herein joined for the plaintiff and assess his damages at the sum of Twelve Hundred and Fifty Dollars and no cents. And we further find that said defendant was guilty of fraud and wilful deceit.
$1250.00 Frank Crowfoot,
Foreman."

After overruling a motion for new trial, judgment upon the verdict was rendered in favor of plaintiff for the sum of $1250. Defendant appealed, and the case is here for review.

While the transcript in this case contains something over three hundred pages, the abstract of record consists of only four pages. It does not contain copies of any pleadings, orders of court, the judgment or instructions, save instruction number four; nor does it contain any evidence or testimony. It is an abstract in name only. Plaintiff in error filed a four page brief, in which he urges but two objections to the validity of the judgment below, viz.:

1. The giving of instruction number four, which reads as follows:

"If you find the issues herein joined upon the complaint for the plaintiff, you will also state in your verdict that

in doing the wrong herein complained of the defendant was guilty of fraud and wilful deceit."

2. It is claimed that about the time of the exchange plaintiff signed a written application for a loan upon the ranch deeded to him by defendant, in which he made the same statements, concerning the amount and kind of crops planted, number of tillable acres of land, value of the ranch, and amount of annual rent it was yielding, that he charges defendant with having made to him before and at the time of the exchange; therefore, it is contended plaintiff is estopped from relying upon the representations alleged to have been made by defendant, as a basis for plaintiff's recovery against him in this action.

As to the first objection, predicated upon the giving of instruction number four, it is clear that the general verdict returned by the jury for the sum of $1250, in favor of plaintiff, cannot be affected by the recital found therein to the effect that defendant was guilty of fraud and wilful deceit. The gravamen of the action was whether or not either party to the action had made false and fraudulent representations to the other, to their damage, concerning the property which was the subject of sale or exchange between them. Such representations were issuable facts in the case, and the jury was charged with the duty of determining and deciding such issues, under proper instructions of the court. As the instruction under consideration is the only one appearing in the abstract, it will be presumed all others given by the court properly stated the law. Only one purpose or object could be accomplished by the recital referred to in the verdict, and that would be to furnish the necessary basis for a body judgment and execution against defendant, the effect of such judgment presumably being to coerce defendant, by imprisonment, into paying the damages assessed by the jury against him. The judgment founded upon the damages assessed by the verdict could be enforced and collected from defendant by an ordinary exe-

cution against his property, irrespective of a body judgment and execution. A body judgment and execution are only permissible in actions of this character by force of the special statute warranting the same, namely, secs. 3024, 3025, Revised Statutes 1908. The former section provides in substance that if in actions of tort (as in the instant case), the jury find the issues in favor of plaintiff, and further find and recite in their verdict that in the commission of the tort defendant was guilty of malice, fraud or wilful deceit, plaintiff will be entitled to an execution against the body of defendant as provided in the section following 3025. This latter section provides that if the jury find as provided in the former section, "it shall be the duty of the court * * * to enter upon its * * * docket, in the discretion of the court, according to the aggravation of the circumstances as proved at the trial, the term for which a defendant or defendants may be committed to jail on a writ of execution against the body in such case. Such term not to exceed one year in any case," etc.

It would appear from the statute cited that two things must be done before an execution against the body of defendant, in a case of this kind, would be of any force or validity: First, the jury must find, and state in their verdict, that defendant, in committing the tort, was guilty of malice, fraud or wilful deceit; second, if such findings and verdict are made and returned by the jury, the court must enter upon its docket the term for which the defendant may be committed to jail on an execution against his body. We have examined the transcript of record, and it nowhere appears therein that the court entered on its docket, at any time, the term for which defendant in this case might be committed to jail. And we fail to find therein any order or judgment of commitment of defendant to jail. Therefore defendant is in no danger of imprisonment, as it is too late now for such order or judgment.

Under the record showing above referred to we are unable to discover wherein defendant has been prejudiced by the giving of the instruction under consideration. If, under the circumstances of this case as shown by the record, it was error for the court to give the same, it was error without prejudice, and should be disregarded. This conclusion finds support in sec. 20, page 17, Session Laws 1911, which reads in part as follows:

"It (the supreme court) shall disregard any error or defect in the proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

As to the second objection, relative to plaintiff's application for a loan upon the ranch, we do not think the contention of plaintiff in error is tenable, for the reason that the record discloses that all the representations made in said application were written therein by defendant himself, and that the application was presented by him to plaintiff Mitchell, accompanied by his request to sign the same. Plaintiff objected to signing the application, giving as reasons that he had never seen the ranch and did not know whether the statements made in the application, concerning the ranch, its crops, value, etc., were true or not. In answer to such objections, defendant assured him that such statements were true, and that it would be all right for him to sign it, and urgently importuned him to sign the same, which plaintiff did, upon faith of defendant's assurances. From this it clearly appears that plaintiff, in making the representations in the application, did not do so of his own knowledge, but, on the contrary, subscribed to the same solely upon the statements and assurances of defendant himself as to their accuracy, and upon defendant's urgent importunity to affix his signature thereto. This being true, it is evident that, as between plaintiff and defendant, defendant is in no position to successfully contend that plaintiff is estopped from supporting his cause of action by prov-

ing (if he can) that defendant made the representations alleged in the complaint, falsely and fraudulently, with knowledge of their falsity, for the purpose of deceiving and cheating the plaintiff, to his damage.

Being unable to discover any reversible error in the proceedings below, the judgment will be affirmed.

Judgment affirmed.

[No. 4063.]

OCEAN ACCIDENT AND GUARANTEE CORPORATION. LTD. v. JOSLIN DRY GOODS COMPANY.

1. APPEAL AND ERROR—*Finding Against Evidence Disregarded.* A policy of insurance against loss by reason of injuries to a servant, provided that where any physician other than those in the service of the insurer should be called, the insurer should be liable only for the cost of "first aid." The physician employed was not in the service of the insurer, but was called at its instance. He made several visits, and charged a bill of $50.00. He testified that this was the fair value of the first visit, and there was no testimony to the contrary. The judgment was affirmed, although the judge before whom the issues were tried, without a jury, found that the value of the first aid was $25.00. (57.)

2. —— *Reasons assigned by the Trial Judge* will be disregarded if there is no error in the judgment. (57.)

Error to Denver District Court. HON. J. A. PERRY, Judge.

MR. JULIAN G. DICKINSON, for plaintiff in error.

MR. CHARLES A. MURRAY, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

On rehearing.

We have carefully reviewed both the law and the facts of this case, and believe the court, in the original opinion, erred in respect to some of the statements and conclusions therein appearing. That opinion will be withdrawn, and the following substituted therefor:

The complaint in this case was filed November 12, 1912, and the purpose of the action is to recover a judgment for $50 for professional services alleged to have been rendered by Dr. Allen Harris in treating one Vaughn for a personal injury received by him while using, or taking care of, horses belonging to defendant in error. Vaughn was an employee of defendant in error (plaintiff below) at the time of the accident, and plaintiff in error became liable for necessary surgical and medical treatment required by him under the terms of a certain accident policy which had been issued by plaintiff in error to the dry goods company. The proper determination of this case hinges upon the construction of said policy.

The case was tried to the court without a jury, and judgment rendered for plaintiff in the sum of $50. Plaintiff in error contends that under the terms of the policy it was only liable to defendant in error for such surgical and medical treatment as Vaughn required immediately after the happening of the injury, commonly known as "first aid" treatment.

The whole case turns upon the construction to be given to two paragraphs found in the policy, to wit:

"(a) That the corporation will furnish through any of the corporation's doctors mentioned below all medical and surgical attention necessary to the treatment of bodily injuries suffered by any person or persons coming within the provisions of the undermentioned policy on condition that the doctor who renders first aid shall also give all subsequent treatment; and,

(b) That in all cases of accident covered by the policy where the services of any other than the corporation's doc-

tors herein named are obtained, the corporation shall only be liable for the cost of first aid, by which is meant such immediate surgical relief as may be imperative at the time of the accident."

The corporation doctors named in the policy are Dr. George F. Roehrig and Dr. Karl F. Roehrig, 242 Metropolitan Bldg., Denver, Colorado.

The complaint pleads in legal effect paragraphs "'a" and "b" above quoted, and that plaintiff paid for and received a policy containing the same. It then recites the injury to plaintiff's employee Vaughn by plaintiff's horses, in the latter part of April, 1912. The decisive question for consideration is whether or not the charges for services rendered by Dr. Harris, for which judgment was given, were cost of "first aid" services only, or included additional charges or cost for services rendered by him subsequently to those of "first aid." It is conclusively shown by the evidence that about the time of the accident plaintiff called up, by phone, the office of the surgeons designated in the policy, for the purpose of notifying them of the accident and to obtain immediate services of one of them for the injured man; that, failing to find either in the office, plaintiff at once notified the local agent of the insurance company, Mr. Van Gilder, of the accident, and the necessity for immediate surgical attention for Vaughn; whereupon Van Gilder directed plaintiff to call some other physician or surgeon to care for the injured man, which direction plaintiff followed and called Dr. Harris to attend him; that at several different times after Van Gilder's direction to plaintiff to employ another surgeon, plaintiff notified him (Van Gilder) that Dr. Harris was attending to Vaughn, to which Van Gilder replied that it was all right.

The contention most seriously urged by plaintiff in error is that, as to the provisions of paragraphs "a" and "b" and the "indorsement clause" in the policy, the trial court misinterpreted the same; and that under no circum-

stances, under the terms of the policy as it reads, can plaintiff recover from defendant any sum whatever in excess of the value of the medical treatment rendered as "first aid" when such services are performed by surgeons other than those mentioned in the policy. From our viewpoint of the record we do not think it necessary to decide this question, as the judgment below can and ought to be sustained upon other grounds. It is admitted by counsel that if the action is for "first aid" treatment only, and the judgment includes no other services, the judgment is right.

The undisputed evidence also shows that Dr. Harris was employed with the knowledge and consent of defendant, to attend Vaughn for his injuries, and that he did so attend him until his recovery; and that the reasonable value of such services was $50, for which amount he presented a bill to plaintiff, who paid the same. The controlling question next presenting itself is: Did such sum represent the value of "first aid" treatment only, or did it include services rendered by Dr. Harris subsequent to those of "first aid," for which a charge was made by him separate from the charge for "first aid" treatment? As to this issue, the only testimony adduced at the trial was that given by plaintiff's witness, Dr. Harris. He was cross-examined at some length by defendant's counsel, and the court propounded to him several interrogatories bearing upon such issue. The form of the interrogatories propounded by counsel for plaintiff in error would indicate that it was thereby sought to elicit from the witness testimony as to the value of the "first aid" services, as contra-distinguished from those subsequently rendered, and as to whether or not he made a specific and separate charge for each kind of service. The following is part of the testimony of the witness in that regard.

Direct examination:

"A. About two o'clock in the afternoon I received a message to see Mr. Vaughn. * * * and made a trip to see him, and examined him and found evidences of a frac-

ture of the seventh and eighth rib and the costal arch. * * * I reduced the two complete fractures of the ribs and also the fracture of the costal arch. * * * I gave him medicine to relieve his pain.

Q. Now, did you follow this up by any further attention?

A. Yes, sir. * * * I made visits after that to see him at his home.

Q. Can you approximate the number of visits you made subsequent to the first treatment?

A. Yes, I presume eight or ten visits.

Q. Now, doctor, you may state what, in your opinion, the treatment you gave this patient on the first visit and all you did there was fairly worth?

A. I think it was worth $50—the first service.

The Court: The first service?

The Witness: Yes, sir. * * * We claim it was worth it. We reduce those ribs and put them in proper position so that they will be held there; maybe they might not. It is for that we charge. We don't know, of course, how many visits we will make afterwards.

Q. If you made only one visit, and had not taken care of the patient afterwards, what would the visit have been worth?

A. $50."

Cross examination:

"A. If I had never seen the case again (after first aid treatment) I should have charged $50.

Q. You don't place it on the future treatment at all?

A. No, sir. * * * I have been trying to separate them (the bills) for twenty years of practice, but we cannot do it. * * * We make our charge $50 for the first (treatment) and then we take care of them afterwards.

Q. And for fractured ribs in charging $50 for it, you take into consideration the extent of what the after treatment would be, do you not?

A. We do."

With no evidence to the contrary it is difficult to conclude otherwise than that the testimony quoted established the fact that Dr. Harris's charge of $50 (for which judgment was rendered) was based entirely upon the "first aid" services rendered, and his subsequent visits were included within the price charged for the same. But counsel reminds us that the court in its findings found that the value of the "first aid" rendered by Dr. Harris was $25, and the services subsequently rendered were also of that value. We do not attach much importance to this fact, as the findings of the court were no part of the judgment. It was an arbitrary division by the court of the two classes of service and their respective values, which appears to be clearly against the undisputed testimony concerning that issue; and, further, it is worthy of observation that the court in the same breath suggested that it was somewhat difficult for it to state how much of the services rendered were "first aid" and how much were subsequent treatments. We think the judgment is amply supported by the evidence; and it is not incumbent on us to concern ourselves with the reasoning indulged in by the court which led to its final conclusion and judgment. If the judgment is right, and is supported by the evidence, the remarks or reasoning of the trial judge should be disregarded. *Little Pittsburg Con. M. Co. v. Little Chief Con. M. Co.*, 11 Colo., 223, 17 Pac., 760; *Warren v. Hall et al.*, 20 Colo., 508, 38 Pac., 767; *Painter v. Wilcox*, 52 Colo., 639, 125 Pac., 503.

The conclusions already reached by us render it unnecessary to notice other errors assigned and argued by counsel. The judgment will be affirmed.

Decided October 13, A. D. 1914. Rehearing denied February 8, A. D. 1915.

[No. 3787.]

CARLTON V. CONE.

MINING PARTNERSHIP—*Authority of Partner.* The managing member of a mining partnership has no implied authority to execute a promissory note in the firm name for his private debt; nor for money borrowed on account of the partnership, where the operations of the partnership are highly profitable, and there is no occasion for the loan. (60.)

Appeal from Teller District Court. HON. JAMES OWEN Judge.

MR. THORNTON H. THOMAS, MR. ARTHUR B. WEST, MR. DUDLEY W. STRICKLAND and MR. WILLIAM V. HODGES, for appellant .

MESSRS. BOUGHTON & ALTER, for appellee.

KING, J., delivered the opinion of the court.

Annie E. Cone, appellee, commenced her action against H. P. Dahl, praying for a dissolution of an alleged partnership and accounting of the partnership transactions. Albert E. Carlton, appellant, intervened as claimant for a large sum upon two promissory notes which he claimed was a partnership liability. Appellee denied such liability.

The complaint in this case alleges, the answer admits, and the evidence shows, that Annie E. Cone, appellee, and H. P. Dahl had been working a mine under lease, under circumstances and conditions from which the law implies the relation of a mining partnership as between the two. During the time they were so operating the mine, Dahl borrowed money from appellant, for which at first he gave his individual notes, to one of which he afterwards signed the name "Dahl & Co.," and assigned and delivered to said Carlton certain insurance policies written in favor of Dahl & Co. covering property of the mining partnership. The controversy herein to be determined arises over the ques-

tion as to whether the said Cone and the said Dahl, as partners, are liable for the payment of said notes, and whether the appellant can collect and retain the proceeds of the policies of insurance. The evidence is sharply conflicting, but where in conflict the court found in favor of appellee. The court made findings of fact, in substance: (1) That the notes in dispute were not given in payment of partnership debts, nor for money used in the partnership operations, but for the individual debts of said Dahl; that Mrs. Cone did not authorize Dahl to borrow the money or execute the notes, or assign the insurance policies, and did not ratify the same. (2) That Dahl and Cone were mining copartners only. Thereupon the court held, as a matter of law, that Dahl had no power, as such partner, to borrow the money, execute the notes, or assign the policies of insurance so as to bind the partnership or the appellee.

The brief of appellant is addressed chiefly to a discussion of error assigned on the second finding of fact and the conclusion of law thereon; but as we think the cause may, and should be, determined upon the first finding of fact and the law applicable thereto, we will consider that only.

The evidence tended to show that Dahl was the managing partner in the operation of a mine under the lease in which he and Mrs. Cone were interested; that at the same time, or during a portion of the time, that they were so working that mine, Dahl was also superintendent of another mine which had belonged to Dr. Cone, deceased husband of appellee, and managing another lease for the estate of Dr. Cone, of which Mrs. Cone was executrix, and that Dahl was also interested in other operations on his own behalf, or, at least, in which Mrs. Cone had no interest; that at divers times Dahl had borrowed money from Carlton, or the bank in which he was interested, for which he gave his individual notes; that shortly before this suit was instituted Dahl executed his note for $4,000 in payment of

other notes which he had given, and perhaps for some additional money, and some time thereafter delivered, as security for the note, the insurance policies involved in the litigation. When the insurance policies were delivered, appellant noticed that they were in the name of "Dahl & Co.," and then, upon inquiry of Dahl, he for the first time discovered that Mrs. Cone was interested in the operation of the lease and the property insured, and, upon Carlton's request, Dahl signed the name "Dahl & Co." to the notes; that soon after Dahl gave another note for the sum of $1,500, these being the notes in controversy. If Mrs. Cone's testimony is credited (and the trial judge gave her credit), she did not know that the money was borrowed or the notes executed, or insurance policies assigned, until after this suit against Dahl was instituted by her for an accounting and dissolution of the partnership. It also appears, and the court found, that about the time of the creation of the indebtedness the operations of the lease were highly profitable, and there was no occasion for borrowing money in that behalf. We think there is sufficient evidence to support the finding of fact, made by the trial court, that the debt represented by the notes was not a partnership debt; that in loaning the money appellant did not rely upon the credit of the partnership or of the appellee; that she did not authorize Dahl to borrow the money, or execute the notes in the firm name, or for the firm's credit or use, and that she did not ratify Dahl's acts; and therefore the judgment should be affirmed.

Affirmed.

Decided December 14, A. D. 1914. Rehearing denied March 8, A. D. 1915.

[No. 4106.]

COE AND STEDMAN REALTY COMPANY V. CORYELL.

1. EVIDENCE—*Admissions—Effect.* Defendant's admission, at the opening of the trial, that his defense is purely equitable, is, *prima facie*, an abandonment of the general denial. (61.)

2. —— *Presumptions.* Defendant's counsel announced at the opening of the trial that the defense was purely equitable. (62.)

Judgment for plaintiff, and error brought. There being no bill of exceptions, it was assumed that defendant adhered throughout the trial to the theory announced at the opening. (62.)

3. JURY—*Equitable Defenses.* Where the defense is entirely equitable the defendant is not entitled to a jury. (62.)

Error to Denver District Court. HON. CHAS. C. HOLBROOK, Judge.

MR. W. W. DALE, for plaintiff in error.

MR. E. L. CLOVER, for defendant in error.

CUNNINGHAM, P. J., rendered the opinion of the court.

Defendant in error filed her complaint in the district court to recover from the plaintiff in error interest which she claimed by virtue of a certain contract which had been entered into by and between the respective parties. The plaintiff in error answered, first a general denial, and then, by way of confession and avoidance, set up certain equitable defenses, admitting the execution of the contract set out in *haec verba* in the complaint, and prayed for reformation or rescission of said contract.

During his opening statement a colloquy occurred between the court and counsel for plaintiff in error, wherein the latter admitted that the defense relied on by his client was purely equitable. *Prima facie* at least, this admission by counsel for plaintiff in error amounted to an abandonment of the general denial. Especially is this so if the

admission be considered in connection with the second defense set up in the answer.

The only question debated in the briefs is as to the alleged error of the trial court in refusing plaintiff in error's demand for a jury. After the trial court had denied the request for a jury, both parties proceeded, the trial occupying a part of two days, resulting in a judgment in favor of the defendant in error for the full amount of interest sued for. Plaintiff in error has not seen fit to bring up any of the evidence adduced on the trial; hence, for aught we know, or can ascertain, even if resort be had to the original record filed in this court, the defendant on the trial wholly abandoned its general denial, and relied entirely upon its equitable defenses. In view of the admissions made at the opening of the trial, to which we have already alluded, we are warranted in assuming, in the absence of a bill of exceptions, that plaintiff in error adhered throughout the trial to the theory announced by its counsel when the case was called. In this state of the record we cannot say that the trial court's ruling denying the request for a jury constituted error of which complaint can now be justly made.

For the reasons stated the judgment of the trial court will be affirmed.

Affirmed.

Decided December 6, A. D. 1915. Rehearing denied March 8, A. D. 1915.

[No. 4090.]

RYAN V. MINERAL COUNTY HIGH SCHOOL DISTRICT.

1. CONTRACT—*Resolution of School Board Construed as.* The vote of a school board to employ a teacher named is not an employment, if the circumstances show no intention to contract. (68.)

Plaintiff and another were applicants for the position of principal to defendant's high school. Plaintiff received the votes of three out of the five members of the board, and the secretary was directed to notify him that he had been appointed. Previous to this meeting of the board plaintiff had conversed with one of the members, and in this conversation it was understood that the salary was twelve hundred dollars, and it appeared that the salary had been fixed at that sum and paid for the two previous years. *Held,* sufficient to warrant a finding that plaintiff was employed at the salary mentioned. (67, 68.)

2. APPEAL AND ERROR—*Presumptions.* Where the issues are tried by the court without a jury it will be presumed that the rule of damages adopted was the true rule if there is nothing in the record to the contrary. (69.)

Action by a teacher for an alleged unlawful discharge, before the lapse of the term of employment. There was evidence of other like employment offered plaintiff, at the same place, for the same salary, and the same time, on condition that he should renounce all claim against the first employer for the discharge. It was assumed that the trial court found that plaintiff was not justified in refusing the position so last offered to him.

3. MASTER AND SERVANT—*Action for Unlawful Discharge—Mitigation of Damages.* One employed as the principal of a high school is unlawfully discharged before the term of his service has commenced; but he is offered employment as superintendent of a grade school, at the same place, for the same time, and the same salary, on condition that he shall waive his claim for damages under the former employment. It is his duty to accept the employment so offered, and having rejected it, and brought an action for the unlawful discharge, he is entitled to only nominal damages. (69, 70.)

The character and grade of employment being substantially the same, the fact that one was a step above the other is not sufficient to warrant the rejection of employment in the lower grade. (71.)

But if the employment offered him, in the second place, had been uncertain as to salary or time of employment, or if he had been offered a less salary, he would have been under no duty to accept it upon the specified condition. (70.)

Error to Rio Grande District Court. HON. A. WATSON MCHENDRIE, Judge.

MR. CLARENCE WERTHAN and MR. HARRY S. SILVERSTEIN, for plaintiff in error.

MR. ALBERT L. MOSES, for defendant in error.

MORGAN, J.

The plaintiff, Ryan, in the lower court, had judgment for costs, in his action against the Mineral County High School District for damages for the breach of a contract which he alleged in his complaint had been made between him and the said district, whereby he had been employed as principal of the said High School. He sued out this writ of error on the ground that he ought to have recovered more than his mere costs in the lower court. Cross errors are assigned on the findings of the lower court, that a contract was made employing plaintiff as principal of the High School, and as to the finding against defendant for the costs.

The defendant answered by general denial, and by a further plea that plaintiff could have received the same sum for like services, as superintendent of the grade school, for the same time, in the same town, which the lower court treated as a plea in mitigation of damages. The trial was without a jury. The lower court found that he had been employed, that he was damaged by breach of the contract in the sum of $1200, and allowed in mitigation of damages the sum of $1200, which he might have received as superintendent, aforesaid, and entered judgment for his costs only. The plaintiff contends that he could not have obtained employment as superintendent, aforesaid, because the offer of such employment was upon the condition that he would release all claims that he might have against the defendant by reason of its breach of the contract sued upon herein; and he contends, further, that he was not required under the law to accept such employment, because it was of a lower grade than the principalship of the High School. He alleged damages in the sum of $2500, and testified that he was damaged, in addition to the loss of salary of $1200

under the contract, considerable sums that he was compelled to pay out in the way of expenses in obtaining other positions, together with excess in the amount he had to pay for house rent, board and other living expenses in other places, greater than he would have had to pay if he had taught under the contract. The defendant contends that no contract of employment was made, for the reason that a mere majority vote on the application did not amount to a contract, and for the further reason that neither the salary nor the term of service was mentioned in the application, or by the board when acting upon it.

It was not error to find that plaintiff was employed, and that a breach of the contract followed. It was undisputed that plaintiff applied for the place; that the application was taken up and considered at a meeting of the full board of five members, at which a motion was made that plaintiff be employed, and a motion that another be employed, neither applicant being present, and the plaintiff received three votes, and the other applicant two, and that the board then adjourned; that the secretary notified the plaintiff by letter that he had been employed; that he accepted the employment before the board took further action; that the minutes of the aforesaid meeting of the board, in addition to a statement of the vote, aforesaid, contained the following: "Three votes were cast for Professor Lafayette Ryan and two for Mr. J. T. Franklin. Mr. L. Ryan being elected, the secretary was instructed to notify him of his appointment. There being no further business, the meeting was adjourned." On the other hand it is conceded that within ten days after this meeting another meeting of the full board was held, at which the former vote was reconsidered and another vote taken, plaintiff receiving two votes and the other applicant three, and that the other applicant, on motion, was then declared elected, and his salary fixed at $133\frac{1}{3}$ a month for nine months; that neither the salary nor the term was mentioned in the application,

or at the first meeting; that the applicant elected at the second meeting taught the school; that plaintiff refused to accept the offer of employment in the grade school, under the condition aforesaid, but offered to accept it without such condition, which was refused; and that he sought other employment; that the salary for the two years previous had been $1200, and the term nine months; that the plaintiff talked with one of the board prior to making his application, and that in such conversation it was understood that the salary was $1200. There was some conflict; the secretary, as a witness for the plaintiff, testified that the president of the board told her in the meeting, in the presence of the other members, who made no objection, to so notify the plaintiff; the president and one other member testified that she was not so notified; two members not testifying. At the second meeting, when the minutes of the first were read, the president asked the secretary who gave her authority to so notify plaintiff, and she answered that he did; the minutes of the first meeting were not ordered to be corrected, and the minutes of the second meeting stated that the minutes of the previous meeting were approved as read.

It is contended that, under these facts and circumstances, the lower court should have held that there was no contract of employment (1) because the vote at the first meeting amounted to nothing more than the expression of a choice between two applicants; and (2) because neither the application nor the action upon it by the board contained any reference to the salary or the term of service.

As to the first ground of this contention, it is clear that if the application, or the action thereupon, had set the salary and the term, a legal contract would have been the result, if there was an intention to make one. Now, eliminating the second ground, it is necessary to inquire as to the question of intention only. There was a plain offer, made to be acted upon, either by accepting or rejecting it; the offer was taken up and considered, a motion was made to

employ the plaintiff, a vote taken, and plaintiff received three out of the five votes, and an adjournment. Furthermore, the secretary wrote in the minutes that plaintiff was elected, and that she was instructed to notify the plaintiff; this conflict was for the court to determine, in the absence of a jury; and if she was so instructed, it was a circumstance indicating that the vote so taken was intended as an acceptance of the application or offer to teach, and that the employment was there and then settled and determined. Therefore, here is an offer and an acceptance, with an intention to make a contract, and present every essential element necessary to constitute one, unless the second contention aforesaid be sound. It is true that a *mere vote* as to the employment, if the circumstances show no intention to make a contract, is nothing more than the "expression of choice," as held in *Malloy v. Board of Education*, 102 Calif., 642, 946, 36 Pac. 948. In that case, however, the opinion states that the board, immediately after the vote was taken, "then and there refused to declare respondent elected," thus showing no intention thereby to make a contract. The court further said: "The vote only amounted to an offer of employment, which respondent had a right to refuse, and the board had a right to revoke or cancel at any time before acceptance." So, in this case, even if the action of the board should have been considered by the lower court as a mere offer, such offer was accepted by the plaintiff before the second meeting, at which the reconsideration and revocation took place. But without this, it is held, in the case of *Weatherly v. Mayor, etc., of the City of Chattanooga* (Tenn. Ch.), 48 S. W., 136, that:

"One having applied to a school board for a position as teacher, and his application having been accepted, and he being elected by the board, it is not necessary to a completed contract that the board notify him of his election, or that he notify it of his acceptance."

As to the second ground of this contention (that neither the application nor the minutes of the meeting of the board at the time the application was accepted contained any reference to the salary or the term), this court is not disposed to disturb the finding of the lower court that a contract, nevertheless, was made employing the plaintiff; because there was enough before the lower court to constitute a *prima facie* case that the action of the board accepting the application was taken with reference to a mutual understanding as to the salary and the term; and, furthermore, when the defendant introduced its testimony, no effort was made to disprove such mutual understanding. The defendant seems to have conceded it.

The *intention* and *understanding* of the parties is the vital issue here, and the contract relied upon should be considered with reference to the facts and circumstances relating thereto. *Denison v. Vinalhaven,* 100 Me., 136, 138, 60 Atl., 798. The lower court had the facts, the circumstances and the parties before it, and was, therefore, in a position to ascertain what the intention and the understanding was; and, having found that the contract was made with reference to such mutual understanding, it is not the province of this court in such instances to set aside such conclusion and substitute its own in the place thereof.

The same may be said as to the contention of plaintiff that the lower court erred in its finding as to the damages and the deduction in mitigation thereof. The undisputed facts on this question are that plaintiff would have received the same sum for the same time in the same town if he had accepted the employment as superintendent of the grade school; that he refused such employment as superintendent of the grade school, because in order to obtain it he would have had to release his claim under the contract sued upon; that he incurred in expenses and losses, in his efforts to obtain other employment, including the loss of the salary under the contract, a sum equal to the amount sued for. The

amount of damages here is a question of fact; the measure of damages a question of law; and the same may be said as to the mitigation of damages. "Rules applicable to ordinary contracts of employment, so far as the measure of damages is concerned, obtain in cases of breach of contract to teach school." *Byrne v. Indep. Sch. Dist.*, 139 Ia., 618, 620, 117 N. W., 983, 984; *Park v. Indep. Dist.*, 65 Ia., 209, 21 N. W., 567.

The lower court's finding that plaintiff was damaged to the extent of $1200 only on account of the breach of the contract must be sustained unless it adopted and applied the wrong measure of damages, and as the court tried the case without a jury, and there were no instructions, it must be assumed that the correct rule was applied, in the absence of anything in the record to show to the contrary. Having held that the plaintiff could have obtained employment as superintendent of the grade school in the same locality, as a matter of fact, the court probably adopted as the measure of damages the amount that plaintiff would have earned under the contract sued upon, and then deducted what he might have earned under the employment as superintendent of the grade school; and, from the findings, it is quite clear this was the rule adopted. This was a correct rule (26 Cyc., 1014) if we accept the premises, which are: (1) That plaintiff was obliged to release his claim under the contract sued upon and accept the grade school employment under such condition; (2) that the employment as superintendent was, substantially, of like character and grade as the employment in the high school; and (3) that the amount deducted in mitigation was the proper amount under the law and the facts.

As to (1), it is the law that if the plaintiff had been offered like employment, without any condition as aforesaid, and for like wages, in the same locality, before sustaining any injury by reason of the breach, he could not recover any damages other than nominal. 26 Cyc., 1013; 20 A. &

E. Enc., 35. And if the plaintiff was not justified in refusing the offered employment, then he could not recover for expenses in trying to obtain other employment. The lower court must have held that he was not justified in so refusing, but should have accepted the offered employment and released his claim for damages for the breach of the contract sued upon. Was such finding error? It is conceded that in many instances, under different circumstances, this question could be answered in the affirmative, but under the facts and circumstances of this case it must be answered in the negative. Such release would not have been any actual loss to the plaintiff. The salary, the term and the locality were the same. It was equivalent, substantially, to the same employment. If he had been at any extra expense in obtaining the grade school position, it should have been deducted from the amount received, and the amount allowed in mitigation thereby reduced. *School Dist. v. Nash*, 140 Pac., 473 (Colo. App.), citing *Development Co. v. King*, 170 Fed., 923, 96 C. C. A., 139. But he would have incurred no extra expense. The lower court had before it the fact that plaintiff would have been compelled to waive his claim under the broken contract sued upon in order to obtain the position as superintendent of the grade school, and must have found that no loss or expense would have been incurred thereby, and this court will not disturb such finding. Of course, if the position had been uncertain in the wages or the term, or was for less wages, which was not the case here, the plaintiff would not have been required to waive or release his claim under the broken contract; this was the only rule laid down in the two cases relied upon by the plaintiff, to wit: *Sparta School Tp. v. Mendell*, 138 Ind., 188, 37 N. E., 604; and *Chisholm v. Preferred Bankers' Life As. Co.*, 112 Mich., 50, 70 N. W., 415. In the two cases of *Jackson v. Ind. School Dist.*, 110 Iowa, 313, 81 N. W., 596, and *Byrne v. Ind. School Dist.*, 139 Iowa, 618, 117 N. W., 983, the rule applied was that a teacher in such instances

is "not required to accept employment in a different locality or in a lower grade." As to the (2) premise, the employment offered was substantially of like character and grade, and was in the same locality. The only evidence in the record concerning the difference in the grade or character of the employment under the contract sued upon was a promotion from the position of superintendent of the grade school. But he also testified that he offered to accept the grade school position if he could get $150 extra, and that it was "the looks of the thing" that caused him to refuse to waive the claim against the High School. The lower court had before it all the facts and circumstances upon which to base a finding on this premise, and its conclusion, that the character and grade of the two employments were substantially the same, ought not to be reversed by an appellate court. The mere fact that one employment might be a promotion from the other, a step higher, or more desirable, is not a sufficient difference in such instance, where the salary, the term of service, the locality and the line of work are the same. As to the (3) premise, the same character of reasoning applies. The lower court first found the amount of the damages for the breach of the contract was $1200, and then allowed as a deduction the same amount in mitigation thereof, and the latter finding was no doubt based upon a finding that the plaintiff would have incurred no expense in releasing his claim under the contract sued upon, and consequently nothing could be deducted from the amount plaintiff would have received under the offered employment. Such conclusion is a reasonable one, for if the offered employment had been unconditional, and the plaintiff had accepted it and finished the term and received the salary, and then sued the High School District for damages for breach of the contract, there would be nothing but the mere breach of contract upon which to base a judgment, and he could not have recovered anything more than he did recover in this case—that is, his costs. In other words, it was the

same as if he had been offered the same employment if he would waive the breach.

In the case of *Sparta School Township v. Mendell*, 138 Ind., 188, 37 N. E., 604, 607, a case relied upon by the plaintiff in error, the court states the rule in accordance with the views herein expressed in the following words: "The rule requiring the acceptance of other employment requires it to be tendered without conditions such as would be so injurious to the person as the yielding of a contract containing advantages for one with no value in it, or one stipulating for less per diem, and liable to be put an end to at any time."

Therefore, the premises being accepted, the finding of the court, as to the damages and as to the amount allowed in mitigation thereof, was not error.

The defendant in error contends that plaintiff should not have recovered his costs, but this contention is without merit. The judgment of the lower court allowed $1200 damages for breach of the contract, and this carried with it the costs and the allowance of $1200 in mitigation of the damages left the costs undisturbed on the first finding.

The assignments by the plaintiff in error having been resolved against him, it is concluded that the lower court committed no reversible error in rendering judgment for the costs only, and the judgment is therefore affirmed.

Decided January 11th, A. D. 1915. Rehearing denied March 8th, A. D. 1915.

[No. 4172.]

WOOD V. YANT, SHERIFF OF OTERO COUNTY.

APPEAL AND ERROR—*Practice—Abstract.* A motion to strike off an abstract because not in strict compliance with the rules, denied; but counsel admonished that a rigid enforcement both of the old and new rules may be expected.

Error to Otero District Court. HON. J. E. RIZER, Judge.

MR. A. B. WALLIS, MESSRS. THOMAS & THOMAS, for plaintiff in error.

MR. FRED A. SABIN, MR. GEO. A. KILGORE, for defendant in error.

Per Curiam:

The motion to strike the abstract of record and the assignment of errors is made on the grounds that the abstract does not contain a sufficient number of folio numbers on the margin thereof; that the abstract contains no index and that the assignment of errors is too general in its nature.

It is contended in resistance to the motion that the abstract was printed before the new rules of the Supreme Court went into effect requiring abstracts to be indexed, and that the other grounds of the motion are not well taken.

The assignment of errors is quite general in its nature and does not strictly comply with the rule, and the folio numbers on the margin of the abstract are not in strict compliance with the rule; and, while the abstract is not indexed, although it seems to have been filed after the new rules went into effect, yet it is not disputed that it was prepared before that time.

The motion is denied, but the attention of counsel is called to the requirements of the old rules as well as the new, and greater particularity should be exercised hereafter

in compliance therewith. Courts of review have been criticised very much for lack of a more speedy determination of causes, and counsel who do not specifically follow the rules adopted to facilitate a speedy determination may expect a rigid enforcement of these rules in the future.

Motion denied.

[No. 4050.]

CRYSTAL PARK COMPANY V. MORTON ET AL.

1. EMINENT DOMAIN—*Way of Necessity*, at common law is an easement implied when one grants land separated from the public highway by land which he retains, and is grounded upon the maxim that every grant includes that without which the grant will be without effect. (79.)

The grant, and not the necessity, creates the right. (79.)

But considering that the taking of such a way would not be a taking without the consent of the owner, because consent is conclusively presumed in every such case, and that such taking would not require the payment of compensation, it was *held* impossible to conclude that the phrase is used in this limited sense in the constitution. (Art. II, Sec. 14.)

The private ways referred to in the constitution are such as are indispensable to the enjoyment of the lands in respect to which the way is claimed; and they are not limited to ways desired for agricultural, mining, milling, domestic or sanitary purposes, as are those for reservoirs, drains, flumes and ditches. (80, 81.)

2. —— *The Necessity for the Courts.* The courts may determine what constitutes a private way of necessity, in any particular case, unless restrained by the legislature. Where the petition showed that petitioner had acquired title to a mountain park in the vicinity of a summer resort, one of the principal attractions to such resort, and that by reason of the conformation of the country the only feasible and practicable way to gain access thereto was over the lands of respondent, *held* that these averments brought the case within the statute. (87.)

3. CONSTITUTIONAL LAW—*Construction of the Constitution.* The construction given by the court of final resort of another state to a constitutional provision which we have adopted from that state is persuasive, if not controlling, in the construction of our own fundamental law. (81.)

4. —— *Legislative Construction.* It will be presumed that the first general assembly, sitting at so short a time after the adoption of the constitution, and composed in part of the members of the constituional convention, did

not intend, in their enactments, to contravene the provisoins of the constitution, so recently adopted. (82.)

The court referred to other sections of the statute as supporting the construction placed upon the statute in question. (86.)

5. CORPORATION—*Articles of Association Construed.* A corporation was organized to acquire an extensive mountain park in the neighborhood of a summer resort; to construct private roads thereto from the public highways leading to the resort, and acquire the rights necessary therefor; and operate vehicles over the same. These powers were held sufficiently broad to entitle the corporation to avail itself of Sec. 2461 of the Revised Statutes. (77, 78, 87.)

6. —— *Title Not Indicating the Business to Be Carried On,* as required by the statute (Rev. Stat., Sec. 846), is still a corporation *de facto,* and may exercise the power of eminent domain. (78.)

Error to El Paso District Court. HON. W. S. MORRIS, Judge.

MR. C. W. DOLPH, MR. CLARENCE M. HAWKINS, for plaintiff in error.

MR. JOHN P. BROCKWAY, for defendants in error.

KING, J., delivered the opinion of the court.

This proceeding was instituted by plaintiff in error to condemn a right of way for a private road across the land of defendants in error. A preliminary order for possession was granted, under which the road was constructed; thereafter a demurrer to the petition was made and sustained, and the cause dismissed. Petitioner below brings the case here for review.

The main questions fairly presented by the record and necessary for determination are:

First. Has the petitioner, in its corporate capacity, the right to condemn land for a roadway when the same is necessary to the use of the premises owned by it?

Second. May the corporate capacity of the petitioner, and its right to maintain this proceeding, be challenged on the ground that its name does not indicate the business to be carried on by it?

Third. Does the petition state facts sufficient to show that petitioner has the right to take a private roadway across the land of respondents, by condemnation proceedings, as a way of necessity?

The first two questions are of minor importance, but will be disposed of in the order given, as a preliminary to the discussion of matters raised by the third, a correct solution of which involves a construction of a provision of the constitution, and is of great importance not only to the litigants, but to the public generally.

The petition alleges that petitioner is a corporation, duly organized and existing under the laws of Colorado, and incorporated with certain objects and powers, among which are the following: To acquire title to certain real estate approximating 1,400 acres, comprising "that huge basin located in the front range of the Rocky Mountains, about two miles from the Town of Manitou, commonly known as Crystal Park, at an elevation of 8,400 feet, world famous for scenic beauty, * * * one of the principal tourist attractions of the Pike's Peak region;" to construct private roadways between said park and the public highways leading into the Town of Manitou; to acquire rights of way necessary for the construction of such private roadways; to acquire automobiles and other vehicles, and maintain and operate the same over the private roadways of the company, and over the public highways, for the purpose of transporting, for hire, passengers, baggage, freight and express between the Crystal Park and other points in the state, particularly the Town of Manitou, and other towns in the County of El Paso. It further alleges that pursuant to its purposes and powers, it had acquired said real estate, and caused to be surveyed and constructed over the only possible, practicable and feasible route a private road leading from the public highway known as Manitou Avenue to Crystal Park, at a cost of over $100,000, and that the road as so surveyed, laid out and constructed, runs over

and across the premises of respondents; that the land in the park is at a high elevation, surrounded by lands of the United States, and other persons, including respondents; that there is no public road, highway or private way leading to or touching said park, and that because of natural conditions stated in the petition the only possible, feasible and practicable way to gain access to Crystal Park from any public road or highway is through a natural gateway leading between gigantic rocks and over land belonging to respondents; that respondents' land lies contiguous to and between lands owned by petitioner; that it is absolutely necessary to acquire the land of respondents sought to be condemned as a right of way of necessity, for the purpose of establishing and maintaining its roadway; that the damage to respondents will not exceed $100; that under and by virtue of section 14 of article II of the state constitution petitioner is vested with a private way of necessity over said lands. Other appropriate allegations, as required by the eminent domain act, are made.

1. The laws of the state provide that corporations may be formed for any lawful purpose, and when so formed they become "bodies corporate and politic in fact and in name;" they are legal entities, artificial persons, and in the transaction of the business for which incorporated, and within the powers conferred by the general laws under which incorporated have and may exercise the same rights that natural persons may exercise. The language of the statute is, "they may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed, as named in their certificate of incorporation." It is our opinion that a private corporation may condemn land for a private way of necessity where the nature of its business and the situation of its property require the way, and where, under like conditions, other persons not corporate may condemn. Moreover, one of the principal objects for which the company was formed is to

construct a road and operate over the same, and without which the other objects for which incorporated, all being parts of one general and lawful business, cannot be transacted; therefore, *prima facie*, petitioner is within the provisions of section 2461 R. S. '08, which expressly confer upon "any corporation formed for the purpose of constructing a road," etc., the right of eminent domain for the purpose of acquiring the necessary easement or right of way therefor. Unless we give to the aforesaid section a more restricted meaning than its language imports, or conclude that, as applied to petitioner, under the facts here pleaded, the statute is in conflict with the constitution, the petitioner must be held to have the right of eminent domain, by virtue of the express provisions of that section of the statute.

2. It seems to be settled law that a charter or articles of incorporation is not the subject of attack in a collateral proceeding, though the objection thereto may be taken advantage of by *quo warranto*. *U. P. R. R. Co. v. Colo. Postal T.-C. Co.*, 30 Colo., 133, 69 Pac., 564, 97 Am. St., 106; *Detroit & T. S. R. R. Co. v. Campbell*, 140 Mich., 384, 103 N. W., 856; *Connolly v. Woods*, 13 Idaho, 591, 92 Pac., 573. Furthermore, even though the defect alleged be conceded, petitioner would still be a *de facto* corporation. A *de facto* corporation may exercise the power of eminent domain. Thompson, Corp., vol. 1, p. 257.

3. Does the petition show that petitioner is entitled to maintain this proceeding?

From the averments of the petition it is made to appear that petitioner is a private corporation, organized for the purpose of carrying on an enterprise for its own special advantage, and while it is argued that the use to be made of the property is *quasi* public, in the sense that the public will be greatly benefited thereby, no claim is made that the company is a public corporation, or the road for public use, except as the public may use it, as the passengers of petitioner, for hire. The right to the roadway sought to be

acquired is asserted on the ground that it is a private way of necessity within the contemplation of the provisions of the constitution and general laws.

Section 14 of article II of the constitution provides:

"That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes."

The statute on eminent domain also provides that under the provisions of that act private property may be taken for private use for private ways of necessity. Section 15 of said article II provides that private property shall not be taken or damaged for public or private use without just compensation.

The main questions presented for consideration on the sufficiency of the petition are (1) whether the roadway under consideration is a private way of necessity within the meaning of those words as used in the constitution, and (2) whether, if found to be a way of necessity, it must also be found to be for use for agricultural, mining, milling, domestic or sanitary purposes.

At the time of the adoption of our constitution the phrase "ways of necessity" had a technical and limited meaning at common law, and respondents contend that it is so used in the constitution. If this contention is sustained, petitioner has no cause of action. The common-law way of necessity is an easement founded upon an implied grant; it is an application of the principle that where one party conveys property, he also conveys whatever is necessary to the beneficial use of that property. It arises only in favor of the grantee over land of his grantor, and not over the lands of a stranger. *Kimball v. Cochecho R. R. Co.*, 27 N. H., 448, 59 Am. Dec., 387; *Pomfret v. Ricroft* (1666), 1 Saun., 320, 323, note 6 (m). The *necessity* for the way does not in any case create the right, as it always originates in some

grant or change of ownership. Jones, Easements, sec. 303; *Toothe v. Bryce,* 50 N. J. Eq., 589, 595, 25 Atl., 182; *Woodworth v. Raymond,* 51 Conn., 70, 75. But it is obvious that the taking of such a way by the grantee over the lands of the grantor would not be a taking of private property of the grantor; nor without the consent of the grantor as owner of the servient estate, for such consent is conclusively presumed from the grant of the dominant estate; nor would it require the payment of compensation to him. Such being the limited meaning of "way of necessity" at common law, it is impossible for us, and, we think, unreasonable, to conclude that the framers of the constitution had in contemplation that character of a way only, or used those words in the limited sense contended for instead of according to their ordinary and natural import. Section 14 is a general inhibition against taking private property for private use without the consent of the owner, but with certain exceptions. The *exceptions* are constitutional *grants* of rights and powers not theretofore existing, namely, the right to take private property for private use, without the consent of the owner, in the instances therein enumerated. *Lamborn v. Bell,* 18 Colo., 346, 349, 32 Pac., 989, 20 L. R. A., 241. If the exception in question has reference to the common-law way of necessity, it is not a grant of any right or power, for that right, arising from a private grant, had been recognized for more than two hundred years before the adoption of the constitution; nor would it be a reservation from the general inhibition against taking private property without consent of the owner, because, as has been said, the common-law way exists only by consent of the owner of the servient estate. Furthermore, to rule that the way of necessity granted by said section is the common-law way, and at the same time limited by the words "for agricultural, mining, milling," etc., "purposes," as contended for by respondents, would admit a still grosser absurdity, as that is equivalent to holding that a way arising from a

grant—in other words, with the consent of the owner of the servient estate—cannot be taken, except such way be for agricultural, mining, milling, etc., purposes.

Our conclusion is that the private ways of necessity granted by the constitution differ from public ways of necessity only in the fact that they are private, and refer particularly to and include passageways or roadways necessary in the sense that they are indispensable to the practical use of the property for which they are claimed; and, further, that such private ways of necessity are there considered and provided for as a character of easement, separate and distinct from those for reservoirs, drains, flumes or ditches, and which was not, as were the latter, limited in use to easements for agricultural, mining, milling, domestic or sanitary purposes. Such is the natural import of the language used.

Our conclusion is strengthened by the following pertinent facts: Prior to the adoption of our constitution the same provision as to private ways of necessity and drains and ditches for agricultural and mining purposes was contained in, and only in, the constitution of the state of Missouri. The official report of the proceedings of the convention that framed the constitution of Colorado furnishes abundant and conclusive proof that sections 20 and 21 of article II of the constitution of Missouri were copied *verbatim* into the drafts to be considered by the Colorado convention, and that after full consideration those sections, changed only in mode of expression, and so as to avoid duplication of provisions, and by the addition of the word "reservoir" and of the words "mining, milling, domestic," became and are sections 14 and 15 of article II of our constitution. For that reason the construction given to those sections by the courts of Missouri is persuasive, if not controlling, in construing our own fundamental law; and, as will be hereafter shown, that state has always recognized as a private way of necessity a passageway or roadway over

land of a stranger to the claimant's title, arising from necessity, without the element of an implied grant; and the same ruling in that respect obtains since the constitution as before. In other words, in Missouri a private way of necessity was and is recognized both as at common law arising from grant, and differing from the common law as arising from necessity. The proceedings of the constitutional convention aforesaid further show that an unavailing effort was made to insert the word "necessary" as a qualification before the words "drains, ditches," etc.; and another, with like result, to add the words "whenever necessary for such purposes" after the words "agricultural," etc., "purposes," as now found in section 14. This shows that the writers of the constitution attached the limitation of necessity to the taking of private property for private roadways, while at the same time they refused to so limit the taking for reservoirs, ditches, etc. A comparison of our territorial laws with sections 2461 and 5851, *infra*, of our present statutes which were enacted by the first general assembly in 1876-1877, and in force ever since, shows that the sections named are substantially the same as the territorial statutes. Moreover, the first general assembly of the state, convened a few months after the adoption of our constitution, for the purpose of making laws, was composed in part of the same men who framed the constitution. It is fair to assume that they knew what they meant when they drafted said section of the constitution, and that when they immediately enacted the same, or similar, provisions as theretofore existed with regard to certain ways of necessity not as at common law, and the right of a corporation organized to construct a road, bridge, etc., to take property by condemnation when necessary for that purpose. they did not intend to contravene the provisions of the fundamental law which they had so recently written, and which must have been fresh in their minds.

A constitutional provision was adopted by the state of Washington in 1889, the pertinent portion of which reads as follows:

"Sec. 16. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation," etc.

In *Long v. Billings*, 7 Wash., 267, 269, 34 Pac., 936, the court, having under consideration the words "private ways of necessity," as used in said constitution, upon a condemnation proceeding by the lessees of land to be used as a stone quarry, for right of way across a tract of land belonging to another, said:

"The allegations show a practical necessity for a way across the particular tract of land. The right to a way of necessity arose at common law when the owner sold land to another which was cut off from necessary access to a highway, by other land owned by the grantor. In such a case the purchaser's right was to have a way designated without any compensation to the owner. But when the purchaser found himself thus cut off by lands not the property of his grantor, his remedy was by means of a public road only; and this public road could be opened only through the proper authorities having such matters within their jurisdiction, through condemnation proceedings, since private lands could not be taken for merely private purposes. In our constitution, however, there is authority for the taking of lands for 'private ways of necessity' (art. 1, sec. 16), and *it is of this authority* that appellant sought to take advantage."

But the court held that before the proceeding could be maintained, the legislature must define what are to be private ways of necessity, authorize persons to apply for them, and prescribe the method by which the necessary land is to

be taken. Subsequent to that decision, and doubtless to conform thereto, the legislature of that state provided that "the owner or owners of any lands which do not abut on any highway, but which are so situated that it is necessary to cross the land of others to obtain a reasonable way to any public highway, may obtain the location and establishment of a road between his or their said lands and the highway by proceeding in the superior court," etc. Laws '95, sec. 1, p. 180.

In confirmation of our statement that section 14 of article II of our constitution is the same in meaning as the constitution of Missouri, we quote a pertinent part of section 20 of article II of that instrument:

"Sec. 20. That no private property can be taken for private use with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes in such manner as may be prescribed by law."

That section of the constitution has been construed and applied in *Cox v. Tipton*, 18 Mo. App. 450; *Barr v. Flynn*, 20 id., 383; *Chandler v. Reading*, 129 id., 63, 107 S. W., 1039. Each of those cases was a condemnation proceeding for a private road leading from plaintiff's land over the lands of defendants to a public road, upon a statute in part as follows:

"If any inhabitant of this state shall present a petition to the county court of the proper county, setting forth that he or she is the owner of a tract of land in such county, or in an adjoining county, and that no public road passes through or touches it, and asking for the establishment of a private road from his or her premises to connect with some public road," etc., the court shall lay out the road. In all of these cases the court sustained the roads as private ways of necessity under the constitution. See also *Snyder v. Warford*, 11 Mo., 513, 49 Am. Dec., 94, and *Chattanooga*

R. & S. Co. v. Philpot, 112 Ga., 153, 37 S. E., 181, under a provision using the words "in cases of necessity private ways may be granted." Those statutes and cases show that the constitutional provision was construed by legislatures and courts to have reference to ways that were granted because they were ways without which the land holder would have no access to public roads—in other words, in which the right existed because of *necessity,* and not by reason of an implied grant. It will be observed also that the foregoing statutory provisions make no distinction on account of the character of the business transacted or carried on upon the lands which do not abut upon a highway. Many decisions, seeming to oppose the views we are announcing, can be cited, but, with one exception, in states whose constitutions contain no such provisions as are found in the constitution of Colorado and of Missouri. We are aware that in *Healy Lbr. Co. v. Morris,* 33 Wash., 490, 74 Pac. 681, 63 L. R. A., 820, 99 Am. St., 964, a constitutional provision the same as ours as to taking private property for private ways of necessity was construed to have reference to the common-law way of necessity; but we are unable to give our approval to that construction. Again, there are decisions of courts under constitutions which neither have a particular limitation on or grant of right to take private property for private use, and upon statutes relative to ways of necessity, which do not recognize the limitations contained in the common-law definition. *Lyon v. Hamor,* 73 Me., 56; *Klicker v. Gilbaud,* 47 N. J. L., 277; *In re Killbuck Private Road,* 77 Pa. St., 39; *State v. Stackhouse,* 14 So. Car., 417; *Dickey v. Tennison,* 27 Mo., 373. In the case last cited, decided before the adoption of the constitution of that state, in speaking of a statute providing for a way of necessity, it was said, "Its very purpose is to secure a right of way to parties *walled* in by the land of others," and

"That act contemplates nothing more than the regulation of the exercise of a right which existed without any

statute, a right of way of necessity which every man enjoyed who owned lands surrounded by the land of others."

Since the adoption of our constitution the general assembly has enacted certain statutes which seem to be a legislative declaration that under the conditions mentioned therein private ways of necessity as contemplated by the constitution exist. We cite sections 5851, 2416, 2461, 2462 and 2464 R. S. '08. These also have a bearing on the contention that the private ways of necessity mentioned in the constitutional provision quoted, and in the eminent domain act, have reference only to ways of necessity for agricultural, mining, milling, domestic or sanitary purposes. Section 5851 provides for the laying out of a private wagon road from the dwelling of any person to a public road, and for condemning the land necessary therefor. Section 2461 provides that "if any corporation formed for the purpose of constructing a road, pipe line, bridge, ferry, * * *" etc., "shall be unable to agree with the owner for the purchase of any real estate or right of way or easement or other right necessary or required for the purpose of any such corporation, for transacting its business, * * * may acquire title to such real estate or right of way or easement or other right in the manner provided by law for the condemnation of real estate for right of way * * *." We think that the legislature, in enacting that section, did not have in contemplation a road used only in connection with the pursuit of agriculture, mining, milling or manufacture, nor a public road; nor do we think it should be so construed, but should be given the interpretation which its language conveys, according to its ordinary and natural import (Sedgwick, Stat. Const., p. 220), namely, a road to be used for purposes for which such utilities are ordinarily used when constructed by private corporations or persons, and that the necessary implication from such statute is that the general assembly regarded a way necessary for the construction of such road, or to connect several parts of

it, a way of necessity.

It may be said that we have no statutory provisions similar to those quoted from the statutes of Missouri and Washington, specifically providing for rights of way by which access may be given to "landlocked" premises. We think the right does not depend exclusively on the statute. In *Lamborn v. Bell, supra,* it is ruled that the constitution, in express terms, confers the right to take private property for the uses therein enumerated, and grants the right as effectually as if expressed in an act of the legislature, and can be enforced when such grant is supplemented by an act of the legislature providing the means for its exercise; that the constitution is self-executing so far as it pertains to the grant. The legislature has provided the procedure. Under the foregoing rule we think the courts may determine what constitutes a private way of necessity in any particular case, unless restricted by the legislature.

Giving the averments of the petition a reasonable construction, there is no doubt that they disclose an absolute, practical necessity for a way over respondents' land, either for the purpose of connecting petitioner's land with the public highway, or for the construction, operation and maintenance of the private road which was one of the principal purposes for which petitioner was incorporated.

We have already said that under our statutes, as we construe them, a private corporation formed for the purpose of carrying on a lawful business has all the rights, powers and privileges of a natural person engaged in the same business. We perceive no reason for any distinction. Under the allegations of this petition, we believe it is clear that a natural person owning Crystal Park and using or intending to use it for the purpose for which it is alleged to be the most valuable, namely, as a place of great scenic attraction, would have the right to a private way of necessity by which he could in a reasonable and practical way have access to and utilize the said lands, and if unable to

agree with the respondents, would have the right to condemn an easement for such right of way. It also seems that petitioner, as a corporation for the purpose of constructing a road, is by virtue of the statute entitled to a practical way over respondents' land as a private way of necessity to connect the parts of the road on either side of said land, all allegations of the petition well pleaded being, for the purpose of the demurrer, admitted to be true. The damage to respondents is trivial; the benefit to the petitioner and to the public is great.

Whether the necessity for a way of any character across respondents' land does in fact exist; or for the particular way asked for, and other matters that may be made issues of fact in condemnation proceedings, will, of course, depend on evidence to be adduced.

There is no argument, and, we therefore assume, no contention, that a parol license to construct the road was given, although averments of that nature are contained in the petition, and estoppel is pleaded. Nor is the question of the unconstitutionality of any section of the statutes argued, although possibly involved; therefore, we do not feel called upon to decide those questions.

The judgment is reversed, and the cause remanded for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

[No. 4109.]

MILLER v. HOUSTON ET AL.

1. PLEADINGS—*Motion for Judgment* is not to take the place of a demurrer. (93.)

2. —— *During Trial.* The practice of moving for judgment on the pleadings after going to trial condemned. (93.)

3. —— *When Allowed,* only where there is an admission that precludes a recovery, or the case stated is such that if established by proof no recovery can be had. (92.)

4. —— *Presumptions.* Where defendant moves for judgment on the pleadings, pending the trial, all the allegations of the complaint are taken as true. (92.)

And the moving party admits the falsity of all his own allegations which are denied by his adversary. (93.)

5. ATTORNEY'S LIEN—*When Allowed.* An attorney who, upon the retainer of the complaining party, and upon an agreement that he shall receive as his compensation a specified share of the recovery, has instituted an action for a tort, and has notified the defendant of his claim for a lien, is entitled to a lien upon the cause of action for the value of his services. (Rev. Stat., Secs. 242, 243.) (93.)

6. —— *Statute Construed.* Nothing in the statute indicates a purpose to exclude causes of action for personal injuries; and in view of the recent development of our factory, power and transportation systems, and mining industries, there is every reason why such causes of action should be included therein. (93.)

7. —— *Collusive Settlements,* with the client, to defeat the just claim of the attorney, are not favored. (94.)

8. DEFAULT—*Motion to Vacate* is in the discretion of the court. (96.)

Error to Denver District Court. HON. GREELEY W. WHITFORD, Judge.

MR. C. F. MILLER, *pro se.*

MR. SAMUEL H. KINSLEY, for Houston.

BELL, J.

The complaint charges, among other things, as follows:

"First. Plaintiff alleges that at all times mentioned in this complaint this plaintiff was and now is an attorney

at law, duly licensed to practice in the State Courts of the State of Colorado.

"Second. Plaintiff further alleges that at the City and County of Denver, State of Colorado, upon, to wit, the 7th day of August, A. D. 1905, at the special instance and request of Josephine Behn, one of the defendants herein, said Josephine Behn and this plaintiff made and entered into a verbal contract, in and by which contract said Josephine Behn employed this plaintiff to render his services as an attorney to recover the sum of Fifty-one Thousand Dollars ($51,000.00) from George M. Houston, one of the defendants herein, upon a certain cause or causes of action hereinafter set forth. And in said contract said Josephine Behn promised and agreed that this plaintiff should have for his said services one-third of the amount recovered upon said cause or causes of action from the said George M. Houston. And in said contract this plaintiff agreed to render his said services as an attorney in said matter, and for the said consideration and contingent fee of one-third of the amount recovered from the said George M. Houston. And this plaintiff was to have no other fee or compensation for his said services in the matter.

"Third. Plaintiff further alleges that as security for this plaintiff's fees in said matter, as aforesaid, Josephine Behn made, executed and delivered to this plaintiff an assignment in the following words and figures, to wit:

'Denver, Colo., Aug. 10th, 1905.

In consideration of services rendered and to be rendered in attempting to enforce payment of a certain claim of Fifty Thousand Dollars ($50,000.00) against one George M. Houston, of Colorado Springs, Colo., I hereby sell, assign, transfer and set over to C. F. Miller an undivided one-third interest in and to said claim.

I, C. F. Miller, attorney, agree to render my services in the above matter for the consideration above set forth.

(Signed) Josephine Behn,
C. F. Miller.'

"Fourth. Plaintiff further alleges that he did all things in proper manner as necessary and required of him by the terms of said contract and according to said contract, and at the special instance and request and instructions of said defendant, Josephine Behn, this plaintiff, by issuing and causing summons to be served upon said George M. Houston, and by preparing and filing a certain complaint, duly verified by said Josephine Behn, commenced a certain action for and in behalf of said Josephine Behn against the said George M. Houston to recover the sum of Fifty-one Thousand Dollars ($51,000.00)."

The complaint further charges that the suit referred to therein was commenced in the District Court of what is now the City and County of Denver, for said Josephine Behn, against the defendant in error, George M. Houston, to recover damages in the sum of $51,000.00 for breach of promise to marry her, for seduction under promise of marriage, and for other causes; that while said suit was pending in said court, and after plaintiff in error had served a copy of the summons in said suit upon defendant in error, Houston, together with a copy of a notice of an attorney's lien claimed by him on all claims of said Josephine Behn against said Houston, growing out of the matters alleged in the complaint filed in said suit, said Behn and Houston conspired together and confederated for the purpose of cheating and defrauding the plaintiff in error of his contingent fee, and in pursuance thereof settled all matters set up in said complaint, and said Behn dismissed said suit upon the payment or promise of payment to her by said Houston of the sum of $10,000.

The instant suit was commenced by the plaintiff in error against said Behn and Houston to recover the sum of $17,000, one-third of the amount claimed by said Behn against Houston in her action against him for damages.

After some contests over the pleadings, the issues were formed and the parties, by consent, went to trial on the merits before the judge without the aid of a jury. During the taking of evidence for the plaintiff in error the following proceedings were had on the part of Houston, the other defendant not having been served:

"George M. Houston, by his counsel, objects to the introduction of any further evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action against the said defendant, George M. Houston, and the court having heard the argument of counsel, and being now fully advised in the premises, doth sustain said objection. And thereupon the defendant, George M. Houston, moves the court for judgment on the pleadings, and the court being now fully advised in the premises doth grant said motion.

"And thereupon it is ordered by the court that judgment be entered herein in favor of the defendant, George M. Houston, and let the same be recorded in the judgment book."

After issues are joined and parties have gone to trial, as was done in this case, on a motion for judgment on the pleadings, all of the allegations of the complaint must be taken as true; and if the complaint was defective in form but sufficient in substance to sustain a judgment, then such motion should be denied. *Rice v. Bush et al.*, 16 Colo., 484.

The right to award a judgment on the pleadings is very much restricted. Unless there is some admission in the pleading of some fact that renders recovery impossible, or the claim is such that no legal recovery could be had if established by proof, a judgment on the pleadings is not allowable. Where it appears that a cause of action is stated, but in an informal or defective manner that might be perfected by amendment, a judgment on the pleadings is not warranted. *Harris v. Harris*, 9 Colo. App., 211, 216.

A motion on the pleadings cannot take the place of a general demurrer and preclude amendments. *Harris v. Harris,* 9 Colo. App., 211, 216, 47 Pac., 841; *Mills et al. v. Hart et al.,* 24 Colo., 505, 52 Pac., 680, 65 Am. St. Rep., 241; *Shuler v. Allam,* 45 Colo., 372, 376, 101 Pac. 350; *Whitehead v. Johnson,* 51 Colo., 587, 119 Pac., 472.

When a party moves for judgment on the pleadings he not only, for the purpose of his motion, admits the allegations of his adversary, but also the untruth of all his own allegations that have been denied by his adversary. *Idaho Placer M. Co. v. Green,* 14 Idaho, 294, 94 Pac., 161.

The practice of proceeding to trial on the merits on defective complaints, then objecting because such complaints do not state facts sufficient to constitute causes of action, is condemned and discouraged by the courts. *Mountain Co. v. Lindekugel,* 24 Colo. App., 100, 131 Pac., 789.

The defendant in error, Houston, insists that the written assignment set up in the complaint is void because, he says, assignments of causes of action based upon personal torts are not authorized. If we were to concede this, it would be immaterial, as the statement of the verbal agreement, and the work done in pursuance of said agreement, are adequate to entitle the plaintiff in error to a lien upon the cause of action for the value of his services. It is quite true, at common law, that all torts which are not injuries to property are not generally assignable. *Mumford v. Wright,* 12 Colo. App., 214, 217, 55 Pac., 744. However, our statute gives to attorneys a lien on all claims and demands in suit and a lien upon all judgments obtained for any fees or balance of fees due or to become due from any client. Vol. 1, p. 125, sec. 293, Mills Ann. Stats., Revised 1912. There is nothing in the statute indicating a purpose of the legislature to exclude causes of action for personal injuries from the lien act. There is every reason why such causes of action should be included therein. Under the recent development of our great factory system, extensive

power, transportation, mining and other developments, serious personal injuries and accidental deaths are constantly taking place among the wage earners and persons of small means. Their suits are generally presented, and necessarily so, for a portion of the amount to be recovered as a contingent fee. Without this privilege it would be most difficult, if not impossible, for most of the injured ones, or the relatives of the dead ones, to enjoy the privileges of the courts in collecting damages for such injuries by reason of the lack of necessary means to employ counsel. However, without this statute, we do not understand that the courts, generally in England or America, permitted collusive settlements between plaintiffs and defendants for the purpose of depriving the attorney of the plaintiff of the value of his services, which made such settlement possible. While public policy favors settlements and cessations of litigation, it does not favor them by collusion and fraud upon other vested rights in the subject of the action. In the language of the Supreme Court of Michigan:

"It is true courts as a rule look with favor upon a compromise and settlement made by the parties to a suit with the consent of all parties concerned, to prevent the vexation and expense of further litigation; but the rule only applies where the rights and interests of all the parties concerned, both legal and equitable, have all been respected and in good faith observed."

Edgar Weeks et al. v. The Wayne Circuit Judges, 73 Mich., 256-258, 41 N. W., 269; *Andrews v. Morse*, 12 Conn., 444, 31 Am. Dec., 755, note: Weeks, Attys., sec. 369.

In *Welsh v. Hole*, 1 Doug., 238, Lord Mansfield, in delivering the opinion of the court, said:

"An attorney has a lien on the money recovered by his client, for his bill of costs; if the money come to his hands he may retain it to the amount of the bill. He may stop it *in transitu* if he can lay hold of it. If he apply to the court, they will prevent its being paid over till his demand is satis-

fied. I am inclined to go still farther, and to hold that if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice."

This has now become the law of England by express statute. 23rd and 24th Vict., c. 127, sec. 28; 31 Am. Dec., 756, note.

In *Henry Rasquin v. The Knickerbocker Stage Co.*, 21 How. Pr., 293, 295, the Court of Common Pleas said:

"Where a settlement is privately effected between the parties, with a design of preventing the attorney from obtaining his costs, the court will, notwithstanding the settlement, allow the attorney to go on and collect the costs in the action that he may thereby secure himself."

In *Richardson v. The Brooklyn C. & N. R. Co.*, 24 How. Pr., 321, the Supreme Court held that the client could not assign a judgment without the knowledge of his attorney, with a view to defraud him out of his fees for services in the action, appointed a referee to determine the fees due, and gave judgment therefor against the assignee.

Sec. 66 of the New York Code, as amended in 1879, gives an attorney who appears for a party a lien for his fees upon his client's cause of action, verdict, report and final decision, and the proceeds thereof in whosoever hands they may come, from the commencement of the action until paid or abandoned. The body of the statute is not more sweeping than our own in awarding an attorney's lien in all actions. The section referred to was before the Superior Court of New York for construction in *Francis Whittaker v. The N. Y. & Harlem R. R. Co.*, 54 Super. Ct., 8, 13, wherein the court stated:

"Nor does section 66 apply only to actions on contract. It gives a lien in every action. This being so, the rule that a personal cause of action founded upon a tort is not as-

signable, can no longer be invoked to defeat the legitimate claim of an attorney for which he has a lien."

Immediately upon the settlement between the client, Behn, and the defendant in the damage suit, Houston, whereby he paid or agreed to pay her the sum of $10,000, the fees of the plaintiff in error to the amount of one-third of at least the sum paid or agreed upon in settlement became due and payable.

We find that the trial court committed no error in opening the default complained of, as it was a matter within its discretion; and there is no merit in the cross errors assigned.

We think the allegations of the complaint, taken as true, which we must assume under a test upon a general demurrer, or upon a motion for judgment on the pleadings, state a cause of action under our attorney's lien statute; and that the District Court erred in rendering judgment against the plaintiff in error. Therefore, the judgment of the trial court is hereby reversed, and the cause remanded for further proceedings.

Reversed and remanded.

Decided February 8, A. D. 1915. Rehearing denied March 8, A. D. 1915.

[No. 4024.]

AMERICAN BONDING CO. OF BALTIMORE V. VICKERY ET AL.

1. EVIDENCE—*Official Documents.* A contract for the survey of certain public lands provided that the work should not be commenced until the contractor should be notified by the surveyor general of the approval of his contract. A letter of the surveyor general to the contractor *held* to establish the required notification. (100.)

2. CONTRACT—*Waiver of Condition.* One having contracted with the surveyor general to make certain public surveys, but only upon first receiving official notice of the approval of his contract, commences and proceeds with the work without such notice; he waives the right to insist upon the specified notice. (100.)

In the same case, a time limit for the completion of the survey was set down in the contract of the surveyor, one Vickery; but, as permitted by its terms, the surveyor general, before the commencement of the survey, directed the surveyor not to proceed until a base-line and principal meridian should be established, and informed him that if he should be unable to comply with his contract in point of time, he should apply for an extension of the time limit, and this direction to the surveyor was repeated verbally and by letter at later dates. Vickery was further notified by the surveyor general, before commencing the survey, that if he should then begin work, prior to the establishment of the base-line and meridian, he would do so at his own risk. *Held,* a waiver on the part of the government of the time limit specified. (101.)

3. CONTRACTS—*Construed.* A contract between one Vickery and the Surveyor General for the survey by Vickery of certain public lands, provided, among other things, that the contractor should conform to the printed Manual of Surveying Instructions, and other instructions issued by the Commissioner of the General Land Office, and with "such special instructions" as he might receive from the surveyor general and such manual and instructions, should be considered as part of such contract. *Held,* that though the contract prescribed a time within which the survey should be completed, the contractor was affected by instructions from the surveyor general not to commence work until a base line and principal meridian should be established by another surveyor. *Held,* further, that Vickery's surveys, having been rejected by the surveyor general, plaintiff, the surety in his bond for the performance of his contract, having, pursuant to the provisions of the manual, procured another surveyor to complete and correct them, Vickery and his sureties in an indemnifying bond given plaintiff, were liable to the expense of such correction. (102, 103.)

4. APPEAL AND ERROR—*Cross Errors not assigned,* will not be noticed. (104.)

Error to Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Messrs. MCKNIGHT & HENRY and Mr. MARVIN H. FARRINGTON, for plaintiff in error.

Messrs. SMITH, BROCK & FERGUSON, for defendants in error.

HURLBUT, J., rendered the opinion of the court.

Action upon a bond, begun August 12, 1911, by plaintiff in error (plaintiff below), against defendants (hereinafter referred to as plaintiff and defendants, as they appear in the original complaint).

At the close of plaintiff's evidence it was non-suited, upon motion of defendants. Motion for new trial was overrulde and judgment entered in favor of defendants, plaintiff bringing the case here for review.

It appears from the pleadings and proof that on June 25, 1904, defendant Vickery entered into a contract with the surveyor general of the United States for Colorado (acting on behalf of the government), to resurvey, mark and establish certain boundary lines of specified townships located in Colorado, and subdivisional section lines within all or part of such townships; that simultaneously with the execution and delivery of said contract, said Vickery as principal and plaintiff as surety, executed and delivered their joint and several bond in the sum of $10,000 to the United States to secure the faithful performance of such contract on behalf of Vickery; that at the time of, or just prior to, the execution and delivery of the bond aforesaid, defendants Albion K. Vickery, Peter O'Brian and Nelson Rhoades, Jr., executed and delivered to plaintiff their joint and several bond in the penal sum of $10,000 to indemnify plaintiff for any damage it might suffer from executing the first mentioned bond to the government, and from the failure or neglect of defendant Vickery to faithfully perform the conditions of the contract first mentioned; that, upon faith of said bond from Vickery, O'Brian and Rhoades, to itself, plaintiff, executed and delivered its bond to the government as already stated; that Vickery attempted to make the surveys in accordance with the terms of his said contract, and submitted the result thereof to the government for approval; that the government, on September 20, 1906,

rejected such surveys *in toto*, but gave him a reasonable opportunity to return to the field and correct and complete his surveys, which Vickery failed or refused to do; that, after such failure or refusal, and on February 23, 1907, the government, at the request of plaintiff, entered into a contract with one Arthur D. Kidder to make the same surveys and perform the same work that was required under the terms of the Vickery contract, which surveys were completed by Kidder and approved by the government, and payment made to him of $6,043.95, which amount Kidder turned over to plaintiff; that, in order to save itself and said Vickery from greater loss under its bond, plaintiff employed said Kidder to make the surveys for the government, which he did make as aforesaid, and paid him therefor a reasonable sum, to-wit, $9,000, and in so doing suffered damage to the amount of $3,352.15, which sum represented the difference between the amount paid by plaintiff to Kidder and that paid by the government to him under its contract with him.

Two serious contentions are urged by defendants to sustain the judgment of non-suit: *first*, that the Vickery contract with the government specifically provided that he should have no power or authority to commence the surveys under the contract until he should be officially notified by the surveyor general of the approval thereof by the commissioner of the land office, and that no such notice had been received by him up to the time the answer was filed, hence, they claim, no right of action accrued to the government against Vickery upon his contract, or against himself or his principal upon their bond, and, such being the case, as they say, no right of action accrued to plaintiff upon the bond which is the basis of this action; *second*, that in harmony with the terms of the Vickery contract the commissioner of the land office and said surveyor general issued written instructions to Vickery to the effect that one Clark, a deputy surveyor, then had a contract with the government to

establish the twelfth guide meridian west, and a certain base line, from and upon which the lines of the surveys to be made by Vickery were to be initiated and closed, and that he (Vickery) must not commence his surveys under his contract until such base line and guide meridian should be established by said Clark; that Clark did not complete such surveys until after the time limit in the Vickery contract had expired, for which reason, it is said, it was impossible for Vickery to make the surveys in accordance with his contract, thereby relieving him of any liability thereunder or under his bond.

There is no merit in the first contention. It appears from the record that on September 26, 1912, plaintiff was permitted by the court to amend its complaint by inserting therein a paragraph to the effect that on or about September 2, 1904, the commissioner of the land office duly approved the said Vickery contract and bond, official notice of which was thereupon given by the surveyor general to Vickery. In support of this allegation a letter was introduced in evidence, dated September 2, 1902, written by the surveyor general to Vickery, containing instructions, and specifically informing the latter that his contract and bond, No. 834, dated June 23, 1904, had been approved by the general land office. This information came to Vickery a little over two months after the date of his contract, and his testimony shows that he began his surveys a few days thereafter, on September 14, 1904. This evidence being undisputed, disposes of defendants' first contention adversely to them. Even if Vickery had not received such notice, the fact that he began his surveys under his contract, on September 14, 1904, and prosecuted the same to completion in February, 1905, was a waiver of his right to insist upon such formal notice of approval.

As to the second contention, it is admitted by plaintiff in its pleadings that Vickery was instructed not to begin his surveys until after Clark had sufficiently established the

base-line and guide meridian to warrant him in beginning his surveys; but, in connection with such admission, it is pleaded that under the provisions of the special instructions of the commissioner to Vickery on August 4, 1904, the latter was informed that if he should find it impossible to complete his surveys and make proper returns thereof before the time required by his contract, he and plaintiff should make application to the surveyor general for an extension of time on said contract. The record shows that, although prior to June 21, 1906, the surveyor general had at divers times requested Vickery, both by letter and personally, to make application for an extension of time in which to complete his surveys under his contract, he made no such application. It also shows that on August 6, 1906, the surveyor general wrote a letter to Vickery, requesting him to return to the field and correct and complete his surveys in accordance with the provisions of the contract and the special instructions of August 4, 1904, allowing him thirty days from the date of the letter in which to signify his intentions as to whether or not he would do so, and warning him that in case he failed to so express his intentions his surveys would be subject to rejection by the government. Vickery ignored the letter. It is evident from the foregoing that the government did not enforce, and did not intend to enforce, the time limit expressed in the contract, namely, May 1, 1905, but, on the contrary, waived such requirement, and offered, even at that late date (August 6, 1906), to permit him to return to the field and correct and complete his surveys if he so desired. It is manifest from such action on behalf of the government that, notwithstanding such time limit, it gave Vickery every opportunity and encouragement to complete and finish his surveys in accordance with his contract; but Vickery declined to take advantage of such opportunity. It is undisputed that Clark's survey of the base-line and guide meridian was completed about May 17, 1905, and that Vickery started to make his surveys September 14, 1904,

after receiving a letter from the surveyor general, dated September 2, 1904, containing the information that if he should then begin work under his contract and close on Clark's base and meridian lines, he would be doing so at his own risk. The evidence further shows the important fact that the initial and closing points or monuments, the base and guide lines and alignments, which Vickery used in establishing his surveys, were, with some slight exceptions, the same as those used by Kidder in making his surveys (the latter surveys being accepted by the government without criticism). This indicates that, although Vickery began his surveys before Clark had completed his work, at his own risk, the same must have been correct so far as the initial and closing points adopted by him were concerned, hence he could not have been damaged by assuming the risk and beginning his surveys when he did, and before Clark had completed his contract.

Defendants further contend with zeal that plaintiff failed to prove (as pleaded in its complaint), that it undertook to, and did, by and through its agent and representative, Kidder, finish and complete the surveys in substantial compliance with the terms and conditions of the Vickery contract; but they say the evidence conclusively showed such surveys were made, not by plaintiff or his representatives, but by Kidder in his own right, under a contract executed between him and the government; therefore they urge that the proof in fact established their second defense. We do not agree with this contention. Plaintiff, in its reply to defendants' second defense, admits the execution of the contract therein referred to, but follows such admission with an allegation that under the rules and regulations of the land office, a compassman may not complete the surveys of his principal, when the same have been rejected by the surveyor general; but in such case the principal is permitted to designate a competent surveyor, acceptable to the surveyor general and the land office, with whom a new contract

for the same surveys may be entered into, accompanied by a new bond executed by the same bondsmen and sureties; that, after the rejection of Vickery's surveys, and in pursuance of such rules and regulations, plaintiff employed and designated said Kidder as such competent surveyor, to make the new surveys, who thereupon entered into the contract mentioned. The rules and regulations were part of the Vickery contract, and binding upon him, and if plaintiff desired to exercise the right therein reserved to it, and have another survey made in accordance with the terms of the Vickery contract, after the rejection of the latter's surveys, it pursued the only course left open to it to do so. Plaintiff's selection of Kidder for that purpose was acceptable to the land office and surveyor general, and thereupon the government, at plaintiff's request, entered into the contract with Kidder. The special instructions to Kidder, dated February 23, 1907, contained a recital that the government executed the contract to him at the request of plaintiff. It is evident from the provisions of the Vickery contract and special regulations accompanying the same, that plaintiff itself was prohibited from entering into a contract directly with the government to make another survey in accordance with the terms and conditions of that contract after the surveys thereunder had been rejected by the government. Kidder having been employed and appointed by plaintiff to make the new surveys, and the government having recognized and acted upon such employment and appointment, it is clear that Kidder's status, as a party to the contract, was only that of a representative or agent of plaintiff.

We have carefully read the case of *Monroe v. United States*, 184 U. S. 524, 46 L. Ed. 670, 22 Sup. Ct. 444, cited by defendant's counsel in support of their contention that Vickery's contract of June 25, 1904, was not a completed contract between him and the government, but do not think it is in point as to any issue appearing in this record. The important distinction between that case and the one at bar

is that in the former, by a special proviso in the instrument, it was not to be deemed a contract or binding upon the parties until approved by the chief of engineers of the United States Army (such approval being withheld); while in the latter it is shown beyond controversy that the contract of June 25, 1904, between Vickery and the government, was fully consummated on September 2, 1904. In the Monroe case the contractor claimed the right to recover for work done before approval of the instrument by the chief of engineers. The court held no contract existed.

Defendants also maintain that there was a fatal variance between the pleadings and proof, and raised such question at the trial, but the court ruled adversely to their contention. There being no cross errors assigned, the point need not be further noticed.

The evidence to which we have alluded, having been adduced by plaintiff, and not disputed, establishes *prima facie* plaintiff's cause of action, and, if not overcome by defendants, would entitle it to judgment. We think the court fell into error in granting the non-suit.

Judgment reversed, and cause remanded for a new trial.

[No. 4104.]

NELSON V. NELSON ET AL.

1. APPEAL AND ERROR—*Abstract Error in Instructions* will not reverse unless it appears probable that the jury was misled to the prejudice of the party complaining; and, as a general rule, this can only be determined by a view of the evidence. (106.)

2. WILLS—*Reasonableness or Unreasonableness* of provisions, are to be considered by the jury in determining both the questions of mental capacity, and of undue influence. (106, 107.)

3. INSTRUCTIONS—*To be Considered as a Whole.* An instruction merely defective, incomplete, or ambiguous, or which leaves room for improper inferences, may be cured by another point in the charge. (108.)

4 BILL OF EXCEPTIONS—*When Necessary.* Where the evidence is not in the record it will be presumed in the court of review that it was not of such character that an erroneous instruction would necessarily or probably mislead the jury. (108.)

Error to Jefferson District Court. HON. H. S. CLASS, Judge.

Messrs. ALLEN & WEBSTER, for plaintiff in error.

Mr. A. C. PATTEE, for defendants in error.

KING, J., delivered the opinion of the court.

Plaintiff in error filed his caveat in the County Court of Jefferson county against the probate of the will of August N. Thelander. The contestor was a nephew of the testator. So far as appears by the record, the entire estate of the testator was bequeathed to a nephew residing in Jefferson county, and another person whose relationship is not disclosed, thereby disinheriting a brother residing in Sweden, and a number of nieces and nephews of the testator, all of whom, with the exception of the contestor, were nonresidents of the state, and, most of them, of the United States. From the judgment of the County Court sustaining the will, an appeal was taken to the District Court, where a verdict was returned and judgment rendered in favor of the proponents of the will.

No part of the evidence is preserved in the bill of exceptions, which contains only the instructions given, objections thereto, rulings on the objections, and exceptions reserved. The only errors assigned are to the giving of instructions numbered 16 and 17 over the objection of the plaintiff in error. The contention made is that the instructions named relate to the precise issues involved, are erroneous under any phase of the case, or any conceivable state of the evidence, and, therefore, a conclusive presumption arises that the alleged errors were prejudicial, and the judgment must necessarily be reversed.

The province of a court of review is to redress real grievances, and not to decide abstract questions of law. For that reason, the rule is general, if not of universal application, that a judgment will not be reversed on account of an erroneous instruction, unless it is made to appear probable that the jury were misled to the prejudice of the party alleging error. It is not sufficient to show that error in the abstract was committed in giving an instruction, but it must affirmatively appear that it was prejudicial, and, as a general rule, this can only be determined by a consideration of the evidence.

In the instant case, twenty-nine separate instructions were given, apparently covering every conceivable phase of the case, and, as a whole, correctly advised the jury upon the law applicable thereto, so far as disclosed by the record here. The issues made include the question of mental incapacity of the testator to make a will, and the exercise of undue influence in procuring its execution. The sixteenth instruction is crude in grammatical construction, without suitable punctuation, vague, and, perhaps, ambiguous in meaning. It states, in subtance, that the laws of Colorado permit a person of lawful age to dispose of his property by will as he pleases, and that unless want of mental capacity in, or the exercise of undue influence upon, the testator, is shown by other clear and convincing evidence, the fact that preference was given by the testator to a niece or a nephew, or even to a stranger, thereby disinheriting brothers and sisters, or even children, would create no suspicion as to the mental capacity of the testator, nor that undue influence had been practiced upon him; and that such disposition, however unreasonable, should not be considered by the jury in arriving at its verdict as to the validity of the will. We think the interpretation we have given to the instruction is the meaning that it would convey to a jury. Taken by itself, this instruction is not an accurate statement of the law, as it appears to withdraw from the the jury the right to con-

sider the terms of a will, whether reasonable or unreasonable, in accordance with or opposed to natural justice, in determining whether the decedent was capable of disposing of his property by will. While the mere fact that the provisions of a will are not in accordance with the ordinary conceptions of justice, would raise no legal presumption of mental incapacity or the exercise of undue influence, and, of itself, would be insufficient to invalidate a will, it would certainly have a tendency to create a suspicion that such injustice was the result of some unusual influence or prejudice, and if clearly unreasonable, absurd or irrational, that suspicion might naturally be referred to mental incapacity or exercise of undue influence. It is obvious that if the disposition of property made in a will may not be considered at all until after the mental capacity or incapacity of the testator or the exercise of undue influence upon him has been proven by other clear and convincing evidence,—in which case it would be unnecessary and futile,—it is not material, and therefore not a subject of consideration at any time, which is directly contrary to the ruling in *Lehman v. Lindenmeyer*, 48 Colo. 304, 109 Pac. 956. Again, it is urged, and may be conceded, that the instruction, in so far as it requires proof of mental incapacity or undue influence by clear and convincing evidence, contravenes the general rule that a preponderance of evidence is sufficient in civil cases. For the reasons given, the instruction, as an abstract proposition, does not contain a correct announcment of legal principles. Nevertheless, we are of the opinion that, in the absence of the evidence, the error shown is not sufficient to justify a reversal. An instruction that is merely defective, incomplete, inaccurate or ambiguous, may be cured by another instruction. *Denver v. Murray*, 18 Colo. App. 142, 70 Pac. 440; *Ames v. Partridge*, 13 Colo. App. 407, 58 Pac. 341; *Stratton C. C. M. & D. Co. v. Ellison*, 42 Colo. 498, 94 Pac. 303; *Little Dorrit G. M. Co. v. Arapahoe G. M. Co.*, 30 Colo. 431, 71 Pac. 389; or

where the instruction leaves room for improper inferences —*Anderson v. Donaldson,* 32 Ill. App. 404. We think the error complained of was cured. By instruction numbered 6 the jury were advised that, in determining the question of mental capacity, they were at liberty to look at the provisions of the will, and if these were contrary to natural justice, that, with other facts, might be considered, but, of itself, would not be sufficient to invalidate the will,—using almost the language of the Supreme Court in *Lehman v. Lindenmeyer, supra.* By instructions numbered 20 and 21, the jury were informed that a preponderance of the evidence only was required, and would be sufficient upon any issue. The jury were also advised that no single instruction contained all the law, but that the instructions must be considered as a whole,—and so considered, in the absence of evidence, we regard it as highly improbable that the jury were misled by the errors pointed out. We think it is fair to assume that if the evidence is of a character to show that the erroneous instruction would of necessity, or probably, mislead the jury, the evidence would have been laid before us to support the technical errors contained in the instruction. We must presume that the evidence was sufficient to sustain the verdict. As was said in *Rice v. Williams,* 18 Colo. App. 330, 335, 71 Pac. 435, 437:

"For aught that appears, there was no conflict in the testimony. Without an opportunity to examine it, it is impossible for use to know whether there was or not. It may have been so conclusive as to preclude any verdict but the one which was returned; and if so, the language of the instruction is not very material."

The first sentence of the seventeenth instruction, taken alone seems to justify the strictures made upon it by counsel, but, as explained by other parts of the same instruction, it cannot be regarded as harmful.

The judgment will be affirmed.

Affirmed.

[No. 4121.]

TRULL V. TRULL.

DIVORCE—*Review—State as Party.* The parties were married upon an acquaintance of ten days, the lady being then of the age of 34 and the groom past 60. At the end of six months she sued for a divorce, demanding counsel fees, temporary alimony, and fifteen thousand dollars as permanent alimony. The husband filed a cross-complaint. Both parties alleged cruelty. Verdict for defendant, and decree accordingly. No errors having occurred during the trial, and the evidence being sufficient to support the verdict, the court, notwithstanding the public interest, declined to disturb the judgment. (110.)

Error to Routt District Court. HON JOHN T. SHUMATE, Judge.

Mr. HENRY HOWARD, JR., Mr. CHAS. T. WHITAKER, for plaintiff in error.

Mr. JAMES C. GENTRY, Mr. ARTHUR L. WESSELS, for defendant in error.

KING, J., delivered the opinion of the court.

Plaintiff in error, erstwhile a "beauty specialist" of Kansas City, Excelsior Springs, Missouri, and elsewhere, came to Colorado to secure some government land as a "nest egg." On arriving at the depot in Steamboat Springs, she for the first time met defendant in error, and in less than ten days married him, believing she had found in him a "diamond in the rough." She was then thirty-four years of age, he a ranchman, past sixty.

After six months of wedded life, plaintiff in error commenced her suit, praying for an absolute divorce from the defndant, for $15,000 permanent alimony, $1,500 attorney's fees, and temporary alimony; charging extreme and repeated acts of cruelty as ground for divorce. Defendant filed his cross-complaint, charging plaintiff with extreme and

for through shipment to Kansas City, Missouri, over the lines of said company, the Southern Pacific Company, and the Union Pacific Railroad Company, by way of Sterling, Colorado, under a feed and transit billing, which permitted them to receive such of said horses that survived from said Union Pacific Railroad Company at Sterling aforesaid. The plaintiffs claim that, by reason of the negligent and rough handling of the cars of the plaintiff in error, the Union Pacific Railroad Company, hereinafter called defendant, ten of said horses were killed before they were deliverd at said town of Sterling; that fifteen more thereof were in such crippled condition when they reached Sterling that they were utterly worthless, and died within a few days afterward; and that ten of said 192 horses were killed on the cars of the Southern Pacific Company, but plaintiffs do not hold defendant in anywise responsible for this loss. It is also charged that one gaited saddle horse escaped, or was taken from the yards used by the defendant company at Laramie, Wyoming, or from the train between there and Sterling, Colorado, and that the 156 survivors were damaged in the sum of $5 each by reason of the negligent and rough handling of the cars in which they were shipped. The [redacted] tried to a jury in the Logan County District by plaintiff in error, nor that in his old age [redacted] of his lifetime may be dissipated by her extravagancies. The evidence, as we read it from the pages of the record, does not appear to be very strongly preponderant in favor of the defendant, but it is not a violent presumption to indulge that the volubility of the plaintiff, and the reticence of the defendant, as well as the effect of the acts mutually charged, were correctly measured by the jury, and legitimate inferences deduced therefrom.

The judgment will be affirmed.

Affirmed.

exercise of a wise discretion had the court granted the former application; nevertheless, as the agents of the defendant were in charge of the train transporting these horses and, from the very nature of things, should have known whether the cars were run with reasonable care, we do not think the court committed reversible error in overruling these applications.

The 192 horses were shipped from McGill Junction to Cobre in Nevada, over the Nevada Northern Railway, and over the Southern Pacific Railroad from Cobre to Ogden, Utah, killing ten of them on the way. The 182 horses surviving were delivered to the defendant at the last mentoined point, and were transported by it to Sterling, Colo., less one lost at Laramie, Wyoming, or between this point and Sterling, Colo., and 25 were killed in transit by the defendant company, or were so injured that they died shortly after their arrival at Sterling. In the billing contract, the value of these horses was limited to $30 each. It is persistently urged by the defendant that the horses that died were injured by the railroad companies moving them from McGill Junction to Ogden, Utah, before it accepted the surviving 182 horses for further shipment to Sterling, Colo.; that plaintiffs did not sufficiently identify the extent

Error to the Logan District Court. HON. H. P. BURKE, Judge.

Messrs. HUGHES & DORSEY and Mr. JOHN Q. DIER, for plaintiff in error.

Mr. JAS. R. PATTERSON and Messrs. MUNSON & MUNSON, for defendants in error.

BELL, J.

The defendants in error, Libby & Day, plaintiffs in the trial court, hereinafter called plaintiffs, on October 3rd, 1910, at McGill Junction, Nevada, delivered 192 Nevada range horses to the Nevada Northern Railway Company

them; but admitted that some of them had their legs skinned more or less, or were rubbed in the cars. Some of the witnesses for defendant testified that, when they saw the horses at the different stations along the line, they were thinner and in worse condition than horses they had seen in former shipments by plaintiffs, while other witnesses for defendant, as well as the witnesses for plaintiffs, testified that they were in the usual condition of horses formerly shipped from the same range by the same parties, when they were loaded at McGill Junction. Day, who accompanied the shipment, testified that the trainmen handled the train with unusual roughness; that they made frequent stops and starts, with such jerks that the cars at times were broken, the horses thrown from their feet and piled upon one another; that he protested and appealed in vain to the employees to be more careful; and he attributed the weakened condition of the horses to such rough handling and negligent management of the train.

The evidence as herein reviewed was submitted to the jury under instructions from the court to the effect that before the plaintiffs could recover, it must appear from the evidence that they themselves or their agents had loaded the cars in which they were shipped. The case was tried to a jury in the Logan County District Court before Judge Burke, and resulted in a verdict for the plaintiffs, upon which judgment was entered for the sum of $1470.

The defendant contends that this judgment is not legally authorized for some forty-nine reasons set up in the assignments of error; but we will herein consider only a very few of the most serious complaints.

It is insisted that the trial court erred in denying the application of the defendant that the complaint be made more specific in material particulars, and a later application for a bill of particulars. The complaint is not a model in the way of giving a clear and concise statement of the facts relied upon; and while it might have been a commendable

under the evidence and the instructions of the court, the difference would equal the sum of $1470, the amount of the verdict returned. However, we do not pretend to say how the jury arrived at their verdict, but they returned such a verdict as was authorized under the conflicting evidence and the instructions of the court. It is the special province of the jury to hear the evidence and determine the weight thereof. They met the witnesses face to face, heard them detail the facts attending this shipment, and we do not think there is anything in the record before us that would justify us in reversing the judgment because the verdict is not sufficiently supported by the evidence.

Defendant's counsel, with considerable industry, clearness and ability, have forcibly urged here many legal positions that they unavailingly pressed before the trial court, but after due consideration thereof, we are of the opinion that the trial court committed no such errors in applying the law at the trial as warrant a reversal of the judgment; hence, the same is affirmed.

at Laramie.

surviving 182 horses for further shipment to [illegible], Colo.; that plaintiffs did not sufficiently identify the extent of the injury done to the shipment by the Southern Pacific Company that the same might be separated from that alleged to have been done by the defendant company, and that, therefore, no legal recovery can be had against it.

Plaintiff Day was asked:

"Would this jerking (of the cars) that you have spoken of between Cobre and Ogden result in injury to the horses that survived to reach Ogden alive?" A. "Well, it would affect them some of course."

The defendant's witness, William Whitlock, superintendent of the stock yards in which the horses were inspected, fed, watered and rested for 24 hours in Ogden, testified that his record showed that the horses were down,

[No. 4137.]

HAZARD ET AL. V. FOSTORIA GOLD MINING COMPANY.

1. NEW TRIAL—*Second Verdict.* Judgment for plaintiff upon evidence of doubtful sufficiency. Plaintiff having twice prevailed, before the jury, upon the same issues, the court of review declined to disturb the judgment. (119.)

2. VENDOR'S LIEN—*Waiver Of.* The vendors accepted the promissory note of a third person in lieu of the second instalment of the purchase money, giving the purchaser, and the depositary of the deed, to understand that the note was accepted as payment of that instalment, or at least as a release of any lien upon the land for the amount; and made no attempt afterwards to correct this impression, purposely concealing their intention to claim a lien upon the land for the second instalment. Accordingly, the third and last instalment being discharged at the appointed time, the depositary delivered the conveyances. *Held,* that although the promissory note so accepted was long overdue, plaintiffs were estopped to assert a lien for the second instalment. (120.)

Error to Gilpin District Court. HON. HARRY C. RIDDLE, Judg.e

Mr. JAMES M. SERIGHT, Mr. WILLIAM C. MATTHEWS, for plaintiffs in error.

Mr. H. A. HICKS, Mr. CHARLES ROACH, for defendant in error.

KING, J., delivered the opinion of the court.

Action brought by plaintiffs in error to obtain judgment against The Fostoria Gold Mining Company, defendant in error, for the sum of $2,500, an alleged balance of the purchase price of lands, and to establish and enforce a vendor's lien. On trial to the court, without a jury, plaintiffs had personal judgment on the money demand. The prayer for vendor's lien was denied. Plaintiffs sued out this writ of error to review the judgment for denial of that demand. Defendant assigns cross-errors as to the personal judgment. We shall consider these assignments in their inverse order.

The defense as to the money demand was that plaintiffs had accepted the individual note of W. R. Strasser in payment of that sum, and thereby had released defendant from liability. The defense to the demand for enforcement of vendor's lien was that it had been waived.

1. Judgment, so far as it went for plaintiffs, was rendered on evidence sharply conflicting, and which, as it appears from the record here, raises a grave doubt as to its sufficiency to sustain the judgment. But the cause has been twice tried before different judges with the same result; wherefore, all circumstances considered, we think the finding and judgment in that respect should not be disturbed.

2. The trial court held that certain acts of the plaintiffs constituted a waiver of their right to a vendor's lien, and should estop them from claiming it. The sum sued for was a part of an installment which fell due October 1, 1903, on the purchase price of mining claims and other lands. The last installment, $10,000, was payable January 1, 1904. The deeds by which plaintiffs conveyed the property to the defendant were held by the Rocky Mountain National Bank of Central City, to be delivered to defendant upon payment of the full amount of the purchase price, pursuant to written instructions accompanying said deeds, the substance of which is stated in *Fostoria G. M. Co. v. Hazard et al.*, 44 Colo. 495. For certain reasons not necessary to state, W. R. Strasser had agreed with the defendant to provide funds for the payment of $2,500 of the installment which fell due October 1, 1903; Strasser, being unable to make payment in cash, effected an arrangement with plaintiffs by which they agreed to accept his individual note for that amount, payable ten days thereafter. In accordance with that arrangement, his note was delivered to and accepted by the plaintiffs, who made such statements to the representatives of the defendant and to the cashier of the bank which held the escrow, that defendant and the said

cashier understood and believed that the plaintiffs had released the defendant from the payment of that balance—at least so far as concerned plaintiffs' right to claim a lien therefor, or to insist upon the retention by the bank of the escrow as security for such payment. Pursuant to that understanding, defendant made final payment of said $10,000 installment on or about the 31st of December, 1903, and the bank delivered the escrows before receiving any notice, and without knowledge, that plaintiffs made any claim to a lien upon the land as security for the amount which they now insist is unpaid, or that the escrow should be retained by it as such security, although the note given by Strasser was long past due at the time the payment of the final installment was made. The evidence justified a finding that if the plaintiffs had in mind the retention of the lien upon the land as security for the payment of the amount for which they took Strasser's note, they purposely concealed that intention from the defendant and from the holder of the escrow. If they had such intention, equity and good faith required them to make full disclosure in due time. We find no error in the ruling of the court, that the acts of plaintiffs were sufficient to constitute a waiver of the lien, or an estoppel against their right to claim it.

The judgment will be affirmed.

Affirmed.

[No. 3753.]

CREIGHTON ET AL. V. CAMPBELL.

1. TRIAL—*Right of Parties to Proceed Under the Issues Presented by the Pleading.* The complaint set up a contract between plaintiff and defendant, and non-performance thereof, praying damages. As matter of inducement the complaint set up certain frauds practiced upon plaintiff by one not a party, but of which, as alleged, defendant had knowledge. Plaintiff having

failed to prove the alleged contract, the court denied defendant's motion for a non-suit, and against the objections of both parties directed the cause to proceed upon issues which the court declared were formed upon allegations of frauds practiced by one Hitchcock, and defendant's responsibility therefor. Verdict for plaintiff and judgment thereon. The complaint stating no cause of action upon which a personal, money judgment against the defendant for the frauds of Hitchcock could be predicated, the action of the court in changing the issues was held error.

2. INSTRUCTIONS—*False Statement of the Pleadings*, prejudicial to a party, is error. (128.)

3. —— *False Statement of the Evidence.* An instruction which impliedly assumes the existence of evidence which was not given is error. (130.)

4. CORPORATIONS—*Directors, Officers.* The statute (Rev. Stat., secs. 852, 865), distinguishes between directors who are elected by the stockholders and officers who are elected or appointed by the directors. Of the officers only the president is required to be a director. (131.)

5. —— *Stockholders—Right to Vote.* A merely nominal owner of the stock of a corporation is entitled to vote thereon. (131.)

6. JUDGMENT—*Presumptions.* Plaintiff contesting the right of defendant to vote certain shares in a corporation which had theretofore been issued to one Hitchcock, and by him transferred to defendant, the jury were instructed that if defendant, at the time of the transfer, knew that the stock had not been paid for by Hitchcock, and knew also of certain frauds perpetrated upon plaintiff and the corporation by Hitchcock, defendant's claim of ownership of the shares would be evidence of fraud on the part of defendant. It appearing that in a former action in which the parties to the present suit, or their privies, were parties, upon the same allegations as to the shares, and the assignment thereof by Hitchcock, judgment had been rendered against Hitchcock and in favor of the corporation for $24,000.00, not declaring either the original issue of the shares nor the assignment thereof invalid, *held* it must be presumed that this judgment settled all issues, and left the stock outstanding in the hands of defendant as assignee of Hitchcock, to the extent, at least, that defendant was entitled to vote said shares. (132.)

7. ESTOPPEL—*By Conduct.* One who, while a director of a private corporation, acquiesces in the assumption of the same position by another, knowing that he is not qualified by his holding of stock, is estopped to subsequently complain of such action by the disqualified person. (132.)

8. MEASURE OF DAMAGES—*Duty of Court to Instruct As To.* Where a definite rule as to the measure of damages can be given, it is error not to instruct the jury as to such rule. (133.)

9. —— *Action for Refusal of Corporate Stock*, to which plaintiff is entitled. The measure of damages is the value of the stock .(133.)

10. —— *Action for Deceit Inducing the Purchase of Corporate Stock.* The measure of damages is the difference between the actual value and what it would have been worth if the representations had been true. (133, 134.)

11. —— *Stockholders' Interest in Corporation—Value Of—How Measured.* The value of the stockholders' interest in the corporation is his proportion, measured by his holding in the stock, of the net assets of the corporation after the discharge of its liabilities. (134.)

12. TRIALS—*Jury Referring to Evidence for a Purpose Prohibited.* The jury were instructed to consider particular evidence only for such light as it might afford upon the acts of the defendants, alleged by plaintiff to have been done for the purpose of defrauding him. In fact, the jury considered the evidence for other purposes, and the verdict upon the question whether plaintiff was damaged at all by the acts of the defendants, was based upon this evidence. The judgment was reversed. (134, 135.)

13. DECEIT—*False Representations as to the Future.* A representation which is in effect a promise to be performed in the future will not sustain an action for deceit. (135.)

14. —— *Frauds of Another* afford no action. Nothing short of actual participation in the frauds complained of suffices to charge the defendant. (136.)

Appeal from El Paso District Court. HON. J. W. SHEAFOR, Judge.

Mr. SAML. H. KINSLEY, Mr. MARTIN M. BURNS, Messrs. CHINN & STRICKLER, and Mr. J. A. RITTER, for appellants.

Mr. J. F. SANFORD, Mr. E. C. STIMSON, Mr. J. W. SLEEPER, for appellee.

KING, J., delivered the opinion of the court.

Plaintiff filed his complaint, demanding damages in the sum of $40,000 alleged to have been sustained on account of the breach of a contract which he alleges was entered into by and between himself and Basil B. Creighton, one of the appellants herein, defendant below. From a judgment for $15,550 defendants appealed.

The complaint is exceedingly voluminous and involved. That portion of the complaint which alleges the cause of action upon which plaintiff supposed he had laid his right

to recover, and upon which he tried the case until the court made another issue for the parties, the cause of action which the defendants answered, and against which they made their defense, until the court required both plaintiff and defendants to proceed upon a theory which neither of them had proceeded on, is found in paragraph or subdivision 6 of the complaint, beginning in the 73rd folio thereof. Practically all the preceding allegations of the complaint are nothing more than matters of inducement leading up to and introducing the real cause of action, and explaining the reasons which led to the making of and entering into the alleged agreement stated in subdivision 6. The cause of action as set forth in said subdivision is, in substance, that, in consideration of the promise of the plaintiff herein to refrain from prosecuting a suit which he had theretofore commenced in the District Court of El Paso County (No. 8422), and to refrain from pressing his objections to a certain assignment made by The Manitou Bathing Company for the benefit of creditors of said company, and to the claims filed against said company in said assignment proceedings, the said Creighton agreed to purchase the property at assignee's sale; to immediately begin, and complete, a bath house, to cost not less than $30,000, on property belonging to said company, and thereafter convey the said property to a company to be organized by Creighton, with a capital stock of 250,000 shares of $1 each; and that he would issue or cause to be issued to plaintiff 30,000 shares of the stock of said company to be organized, and do and perform certain other acts fully set out and alleged in the complaint; that plaintiff had kept and performed, or was ready to keep and perform, the contract on his part; that Creighton had caused the said company to be organized, conveyed to it all the property mentioned in the agreement, had secured, or had control of, the capital stock; but failed and refused to issue any thereof to the plaintiff, and in other respects failed to comply with the terms of the con-

tract on his part, to the damage of the plaintiff in the sum of $40,000. The prayer was for judgment in that sum, and that it be made a lien on all the property of The Manitou Bathing Company, and of the new company (The Manitou Mineral Springs Bathing Company), to which the property of the old company, purchased at the assignee's sale, had been conveyed.

The matters of inducement alleged were, in substance, that in 1905 The Manitou Bathing Company, a corporation, was organized with a capital stock of $110,000; that the by-laws provided, as a qualification for each person elected as an officer of the company, that he should hold at least 1,000 shares of stock in the company, and that no officer should be paid a salary until the company should be on a paying basis; that the indebtedness of the company should at no time exceed $15,000, and that a vote of the majority of the capital stock should be necessary to authorize a mortgage or encumbrance of the property; that in the summer of 1906, one Daniel N. Hitchcock, an acting director, and the president and manager of the said company, falsely represented to the plaintiff that The Manitou Bathing Company was then the owner of a large amount of real estate at Manitou, Colorado, fully paid for and free of encumbrance, of the value of $50,000, which had been conveyed to the company by said Hitchcock, in consideration of the issuance to him of 56,000 shares of the capital stock of said company; that the remaining 54,000 shares had been set aside as treasury stock, to be sold at par, for the erection and equipment of a bath house upon a part of said real estate; that upon faith in these representations, plaintiff paid to said Hitchcock $21,200 for 21,200 shares of said treasury stock; that the said real estate had not, in fact, been fully paid for, but that much of the money received from plaintiff was used for paying for said real estate, instead of being utilized for the building of a bath house; that from the 7th day of August, 1906, until the 7th day of August, 1907, Campbell

and said Hitchcock constituted two of the board of three directors; that on August 6, 1907, plaintiff, defendant Creighton, and one A. M. Daggett, were elected a board of directors, and that on and after August 6, 1907, the defendant Creighton had knowledge of all the misrepresentations, deceit and fraud alleged to have been made and practiced by Hitchcock to and upon the plaintiff; that the said Creighton was not at any time the owner of to exceed 220 shares of stock in said company; that said Hitchcock never in fact *paid* for the 56,000 shares of stock, or any part thereof, issued to him in consideration of the transfer of said real estate; that on the 10th day of September, 1906, the said Hitchcock and one Stauffer, as directors, voted to borrow $1,500, and gave a trust deed of the company, on the company real estate, to secure the loan, over the protest of the plaintiff, and without authority of a vote of a majority of the capital stock; that on or about the 15th day of October, 1906, Campbell's wife, as a stockholder of said company, brought suit in the District Court on behalf of herself and others similarly situated, against the said Hitchcock and The Manitou Bathing Company, and the said Stauffer as director, in which suit The Manitou Bathing Company was made defendant, in order to protect the rights of the company, and stockholders, and because the company refused to bring the action; that in said suit all the representations and fraud perpetrated on the plaintiff, by said Hitchcock, as set forth in this complaint, were set forth, all of which matters, it is said, were fully known to defendant Creighton on and after the 6th day of August, 1907; that said suit proceeded to final judgment, and on the 25th day of January, 1908, resulted in a judgment against the said Hitchcock, in favor of The Manitou Bathing Company, in the sum of $24,308.59.

That on the 31st day of March, 1908, defendant Creighton and said Daggett, assuming to act as directors of the company, made an assignment of the company's property

for the benefit of its creditors to one T. J. Sandford as assignee, in which they claimed the total assets of the company were $15,305.10, and the total liabilities $18,593.18. Extended allegations are then made for the purpose of showing that the assignment proceedings were not valid, and that claims were filed, and allowed by the court, with the knowledge and connivance of said Creighton, that ought not to have been allowed; that while the said assignment proceedings were pending and undetermined, plaintiff herein began a suit in the District Court, being No. 8422, against the said Creighton, Sandford, the old company ,and others, in which all the things in the instant case, except those set out concerning the agreement, were alleged, and which asked for an injunction restraining the allowance of the claims by the assignee, and to restrain the assignee from further acting, and alleged that summonses in said suit were served on Creighton, Sandford, and other defendants, in August, 1908.

We have not undertaken to state in detail every allegation of the matters of inducement, but in substance sufficient for our present purpose to show the nature of the allegations, and bring the statement of the pleadings up to subdivision 6, which pleads the alleged agreement upon which this suit is predicated.

The defendants' answer put in issue the misrepresentations alleged to have been made by Hitchcock, and denied that Creighton had knowledge thereof; admitted the assignment and denied its invalidity; admitted, or alleged, the sale of the property thereunder by the assignee for the purpose of paying the claims which had been allowed by the court; the purchase of said property at assignee sale by or for the defendant Creighton; the payment or settlement by Creighton of the company's debts out of the purchase price for which the property was bid in; the organization of the defendant The Manitou Mineral Springs Bathing Company; the transfer by Creighton, or his trustee, to

the last named company of all property purchased at the assignee's sale, for the stock of the new company; denied the agreement alleged in subdivision 6, as well as all the representations alleged to have been made by him, constituting or leading up to said agreement.

After plaintiff had introduced his evidence on the matters of inducement, and to support his cause of action on the agreement, and rested his case, defendants moved for a nonsuit, whereupon the court held that plaintiff had failed to prove the agreement, and that, in fact, the evidence showed the alleged agreement had not been made, but denied the motion for nonsuit, and, over the protest of both plaintiff and defendants, required the trial to proceed upon the issues which the court said were formed upon the allegations of fraud committed by Hitchcock, and Creighton's knowledge thereof, and stated that the jury would be instructed that the alleged contract had not been proven, and that the jury would not be allowed to take into consideration "any evidence of the negotiations looking toward the making of a contract as alleged in the complaint, except for the purpose of such light, if any, as it may throw upon the knowledge possessed by the defendants, or either of them, of matters preceding the time that it was alleged said contract was entered into."

In our opinion, the court erred in refusing to grant defendant's motion for nonsuit after holding that the agreement sued on had not been proven. It is clear that the issues had not been formulated by either party for the purpose of trying the case upon an issue of fraud, except as incidental to the agreement. We think the defendants did not waive the right to object to the trial upon such issues. If the complaint, except upon the agreement, may be held to state any cause of action as against the defendants upon which any judgment could be predicated, we think it does not state a cause of action upon which a personal money judgment against the defendants, or either of them,

upon the grounds of fraud alleged in the complaint, can be sustained. The issues were not submitted to the jury for determination upon any other ground than that of fraud, consisting of misrepresentations and deceit. The latter conclusion is made plain by the instructions, particularly instruction No. 6, defining fraud as used in this case. There is no allegation and no proof of any misrepresentations made to the plaintiff by either of the defendants in this case, and no proof of any misrepresentations made to or fraud practiced upon the plaintiff by said Hitchcock or The Manitou Bathing Company, with the knowledge, consent, or connivance, of the defendants or either of them, at or prior to the time the same were made, nor of which they had knowledge until long after the time that any damage suffered by plaintiff by reason of the misrepresentations, fraud or deceit alleged to have been practiced by Hitchcock had accrued.

But if the complaint be treated as sufficient as a cause of action for fraud, nevertheless, it appears that instructions given over the objections of the appellants are so prejudicially erroneous as to require reversal. The first instruction, which purported to state at length the issues made by the complaint, concludes by stating, as one of the allegations thereof:

"That all of the foregoing matters and things were done by and with the knowledge and consent and approval of said Creighton and the said company for the purpose and with the intent to defraud the said plaintiff, and in furtherance of the false and fraudulent representations made to said plaintiff by the said Hitchcock, and in furtherance of the fraud alleged by the plaintiff to have been practiced upon him by the said Hitchcock."

The sentence quoted is incorrect and erroneous in this: the matters charged in the complaint as having been done by Hitchcock were done in the year 1906. The defendant company was not organized until late in 1908. There is

no allegation in the complaint that such matters and things were done with the consent of defendant Creighton, nor that he had knowledge thereof, until on and after August 6, 1907, and no allegation that they were done with his approval, or that of his co-defendant. There is no allegation in the complaint that the matters and things alleged to have been represented by defendant Creighton were false, nor that his acts were done for the purpose or with the intent of defrauding the plaintiff, nor that they were made or done in furtherance of the false and fraudulent representations made to plaintiff by said Hitchcock, nor in furtherance of the fraud alleged by the plaintiff to have been practiced upon him by Hitchcock. One exception may be noted: It is alleged that defendant Creighton caused certain capital stock to be transferred to him for the purpose of defrauding plaintiff of any claims or demands plaintiff might have against said Hitchcock or The Manitou Bathing Company. But there is neither allegation nor proof that it accomplished that purpose, nor is there any prayer that such transfer be set aside or held invalid. This is not a suit against Hitchcock or The Manitou Bathing Company, nor in aid of a suit against them. Such a misstatement of the allegations of the complaint could not be otherwise than prejudicial to the defendants. The seventh instruction, after instructing the jury that the evidence failed to prove the agreement sued upon, further instructed them that the evidence introduced relative to *negotiations* looking toward the making of the agreement as alleged "may be taken into consideration by you solely and only for the purpose of such light, if any, as it may throw upon the alleged acts and doings of the defendants or either of them, *alleged by the plaintiff to have been done for the purpose of defrauding him.*" That portion of the instruction italicized continues and accentuates the error noted in instruction No. 1, as it erroneously assumes that, with the one exception noted, there were any allegations of any acts

done by defendants or either of them for the purpose of defrauding the plaintiff. Further attention will be called to this instruction later in this opinion.

By instruction 9 the jury were instructed that if they believed an omnibus list of things assumed to be alleged in the complaint, and that the plaintiff was damaged thereby, they should find against the defendants. Among said matters are the following: "That the said directors, including the said Creighton, borrowed $1,500 and gave a trust deed to secure the same upon a part of the said real estate of said Manitou Bathing Company," etc. There is neither allegation nor proof that the directors, including Creighton, borrowed said money or gave a trust deed therefor; in fact, both allegation and proof are that the money was borrowed and the trust deed given long before Creighton became a director. An instruction that impliedly assumes the existence of evidence which was not given is erroneous: *Bowling v. Chambers*, 20 Colo. App., 113, 122, 77 Pac. 16; *Fisk v. Greeley Elec. Lt. Co.*, 3 Colo. App., 319, 324, 33 Pac. 70. Another: That at said time (August 6, 1907), or at any time the said Creighton was not the owner of as many as one thousand shares of stock in the said Manitou Bathing Company, and that he could not become a director thereof under the by-laws of said company without being the owner of at least one thousand shares of stock in said company." There is no allegation in the complaint, nor proof, that under the by-laws the ownership of one thousand shares of stock was a necessary qualification for becoming a director. The allegation was that the ownership of one thousand shares of stock was a necessary qualification for becoming an *officer*. While the position of director of a private corporation is sometimes spoken of in a general way as an "office," the statute clearly distinguishes between directors who are elected by the stockholders and officers of the corporation who are elected or appointed by the directors. Of such officers, the only one

required by statute to be a director is the president. The evidence does not disclose that the by-laws made any like qualification as to a mere director, nor that the defendant Creighton held the office of president of The Manitou Bathing Company, or acted as president, or any other officer, in the transactions alleged to have resulted in damage to the plaintiff. But if we concede that the allegations included this qualification for a mere director, the proof here shows that from and after February 7, 1908, Creighton was holder of 56,220 shares of stock by transfer on the corporate books, and issuance to him of the certificates. It does not appear that the transfer to him was without consideration, nor merely colorable. Therefore, *prima facie*, he had the right to vote the stock and act as director, even though he was a merely nominal owner—*State v. Leete*, 16 Nev., 242; *Re Argus Printing Co.*, 1 N. D. 434, 48 N. W. 347, 12 L. R. A. 781, 788, 26 Am. St. 639. The *prima facie* showing was not overcome by the evidence.

As a part of said instruction 9, the jury were also told that if they believed the defendant Creighton claimed to be the owner of said 56,000 shares of stock of The Manitou Bathing Company, issued to Hitchcock under certificates 1 and 2, and that at the time of the transfer to Creighton of said shares he knew that the stock had not been paid for by said Hitchcock, and also knew, when he purchased the same, of the alleged fraudulent representations made to and perpetrated upon the plaintiff by said Hitchcock and The Manitou Bathing Company, such claim of ownership by Creighton would be evidence of fraud. It is not alleged nor proven that Hitchcock did not cause the real estate to be conveyed to the company before he assigned the stock, or it came into the hands of Creighton. The evidence shows that when Creighton was first elected director by the use of that stock, it was voted by his assignor, the assignee of said Hitchcock, and that at the time he claimed to be the owner thereof and voted it, it had been duly assigned and

issued to him. Furthermore, the complaint alleges, and the evidence shows, that another suit, to-wit, suit No. 8046, had been prosecuted in the same court, in which the parties to this suit, or their privies, were parties, and in which the allegations were the same as the allegations made in this suit relative to the treasury stock, and also to said 56,000 shares of stock, and in which one of the issues made was that said 56,000 shares had not been paid for by Hitchcock, and was invalid, and that Hitchcock's assignment thereof was also invalid. The evidence shows that after full trial, judgment was rendered against said Hitchcock for $24,000, to be paid to said The Manitou Bathing Company, on an accounting for the stock as well as other funds, but which did not purport to invalidate the original issue, nor the subsequent assignment of said stock, nor enjoin the transfer thereof. Therefore, in the present state of the record, the presumption must be indulged that the money judgment settled all issues, including the prayer for permanent injunction, and left the stock outstanding in the hands of Hitchcock's assignees, including Creighton, valid, at least to the extent that such assignees had the right to vote the stock. In the condition of the pleading and proof, the submission of that question to the jury was error.

Moreover, although plaintiff was a director, he did not at any time object to Creighton's acting as director or officer on the ground that he was not qualified by the amount of his stock-holding. Is he not now estopped from objecting on that ground?—Cook, Stock & Stockholders, section 523, p. 851.

Again, the jury were instructed that if they believed that "all of the foregoing matters and things," being all the matters and things assumed to have been set forth in the complaint, were done by or with "the knowledge and consent of the said Creighton and the said company, and with the intent to defraud the said plaintiff, and in furtherance of the false and fraudulent representations made to

plaintiff by said Hitchcock, and The Manitou Bathing Company, if any were made, and in furtherance of the fraud alleged to have been practiced upon him by the said Hitchcock and The Manitou Bathing Company, if any there was," etc., they should find for the plaintiff. For reasons already given, this portion of the instruction of itself would be quite sufficient to require a reversal. We doubt whether many, if any, of the matters alleged as the fraud of Hitchcock are material or competent to sustain the cause of action against fendants upon which judgment was rendered.

We think the court committed error in giving instruction 10, in that it did not give the proper measure, or any measure, of damages. That instruction is as follows:

"If you find for the plaintiff, you will assess his damages at such sum as you may find has been proven by the evidence, so as to fully compensate him for the damage sustained, and no more, and not in any event to exceed the sum of $40,000."

The law seems to be settled in this jurisdiction that in cases of this character, where a definite rule for the measure of damages can be given, it is error in the court not to instruct the jury as to such rule.—*Mustang Res. Co. v. Hissman*, 49 Colo. 308, 112 Pac. 800; *Colo. Spgs. Co. v. Albrecht*, 22 Colo. App. 201, 123 Pac. 957. In the complicated and confused state of the pleadings and record, it is argued that three causes of action are included in one count of the complaint, namely, (1) an action for breach of express contract, (2) an action for damages for fraud and deceit practiced by Hitchcock on the plaintiff, of which defendants had knowledge, (3) conversion of plaintiff's property by defendants. Under the first cause of action it is clear that the measure of damages would be the value of the capital stock in the new company, which plaintiff alleges he was to receive under the contract. Under the second cause of action, the measure of damages would seem to be the difference between the actual value of the stock

and what it would have been worth if the representations made by Hitchcock had been true.—Thompson, Corp., 2nd ed., vol. 1, p. 700, and cases cited; Smith, Law of Fraud, section 299; *Van de Wiele v. Garbade*, 60 Ore. 587, 120 Pac. 752. Under the third cause of action, the measure of damages would be the value of the property converted by the defendants; but in this case the property alleged to have been converted was the property of The Manitou Bathing Company, in which the plaintiff was a stockholder. The value of plaintiff's interest therein would be the value of his proportion (measured by his stock-holding) of the net assets of The Manitou Bathing Company after all its debts had been paid. These contentions make manifest the necessity for instruction as to measure of damages. If we were to concede—which we do not—that the evidence was sufficient to justify instructions as to measure of damages on the last two causes of action, nevertheless, no rule for the measure of damages having been given, but the jury left to determine the limits of compensation from conjecture, without reference to legal rules, the verdict cannot be sustained.

Attention has been called to instruction No. 7, under which the jury were not permitted to consider the negotiations looking toward the making of the agreement alleged in the complaint, except for the purpose of such light as it might throw upon the acts of the defendants alleged by the plaintiff to have been done for the purpose of defrauding him. It is plainly shown by the answer made to special interrogatory 2 that the jury not only considered said negotiations for other purposes than that directed, but that their decision of the entire question as to whether plaintiff was damaged at all by defendants' acts was based upon such negotiations. Special interrogatory No. 2 propounded to the jury, and the answer thereto, are as follows:

"Question 2. If you find from the evidence that the plaintiff Campbell has been damaged by the acts and doings

of the defendant Creighton and the defendant Mineral Springs Company, or either of them, how was the said Campbell damaged?

Answer. Plaintiff Campbell was damaged by relying on representations made to him by Creighton and J. K. Vanatta looking to an equitable settlement of the Manitou Bathing Company and refrained from presenting or pressing his claims against said company in court."

As has been said, consideration of the agreement alleged was taken from the jury. That agreement, however, so far as established, consisted of the negotiations and representations "looking to an equitable settlement" of all matters concerning The Manitou Bathing Company. Therefore, it appears by said answer that the jury not only considered the negotiations for other purposes than that permitted, but that they treated such negotiations as equivalent to an agreement under which the plaintiff had a right to refrain from pressing his claims, which was directly prohibited by such instructions. Moreover, a representation which constitutes a promise to do something in the future will not sustain an allegation of fraud and deceit.—Smith, Law of Fraud, section 7. Furthermore, it would be absolutely impossible for the jury, or any one else at this stage of the proceedings, to determine what result would have followed the pressing of such claims against the assignment, and therefore there could be therein no foundation for estimating the damages.

We have considered only a few of the objections urged, but we think it unnecessary to mention others.

In this case, as in many others, it is strongly urged that, although errors may have been committed, nevertheless, as it appears that the verdict is not excessive, and that substantial justice has been done, the judgment should not be reversed. But, although we may agree that the verdict is not in apparent excess of the plaintiff's probable loss sustained by reason of his trusting in Hitchcock's repre-

sentations, yet it is impossible to concede, under the state of the record, that Creighton can be held liable personally for Hitchcock's fraud. Nothing short of actual participation in such fraud, or its legal equivalent, can make him so liable. His status as a *particeps criminis* is not shown.

Moreover, the civil code and the rules of practice adopted by the Supreme Court are intended to provide, and do provide, an orderly procedure designed for the purpose of making up issues for trial and for the conduct of trials. The right to insist upon a substantial compliance with these provisions of the code and rules is the right of every litigant, and the denial of such right is the denial of a substantial right. In this case it is clear that plaintiff and defendants alike construed the issues made to be upon the alleged agreement, and defendants formulated their answer to meet that issue, and that only. We think that was the true construction. But when the court took that issue from the jury and directed the trial to proceed upon other issues not understood by the parties to have been made, the trial ceased to be an orderly presentation of evidence essential to the controversy, to such an extent that the learned trial judge, in desperation, declared that he would no longer attempt to limit the introduction of testimony to that which was admissible, but would let the parties "make it as ridiculous as possible on both sides." It would be difficult to conceive of a more chaotic and unsatisfactory state of the record than is here presented. This condition is emphasized by the defendants' answer, formulated, as we have said, to meet certain issues, and under which no agreement was reached by court and counsel as to what allegations of the complaint were denied or put in issue, and by the fact, clearly outstanding, that the plaintiff had little first-hand knowledge of the testimony that was necessary to support his complaint in the many matters affecting the defendants. Much of the testimony which he did give was elicited by his counsel only after verbal castigation and the pressure of

leading questions, and which upon cross-examination was admitted to be based upon information derived from his attorney.

As to the cross-errors assigned, we think the court could not do otherwise than withdraw from consideration the agreement as it was alleged; but we are not satisfied that the court might not have submitted to the jury the question as to whether some agreement, consisting of a written proposal submitted by Creighton, and its verbal acceptance, with modifications, understood by both, did not constitute an agreement, or understanding, upon which both parties proceeded, and in reliance upon which plaintiff did in fact permit the assignment and the sale thereunder to proceed, not only without objection, but with his full consent and approval, and by reason of which the defendants in this case may be under obligations, in equity, to share with defendant the capital stock of the defendant company. We think the court did not err in charging the jury that for the purposes of this action, the assignment made for the benefit of creditors and the claims presented therein and allowed must be regarded as valid, whatever may be the rule in an action under the statute of frauds.

If this suit were in the nature of a creditor's bill, or to hold the defendants to an accounting as trustees, or a proceeding to hold the property involved to satisfy any judgment that might be obtained by plaintiff against Hitchcock and The Manitou Bathing Company, and all necessary parties were parties hereto, an entirely different question would be presented as to the materiality and effect of the evidence. The record shows that proceedings of that nature were instituted before the instant suit was begun, and are still pending; but they have not been consolidated with this, and cannot be considered as affecting the present case.

The judgment is reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

HURLBUT, J., and BELL, J., concurring.

CUNNINGHAM, P. J., not participating.

Reversed and Remanded.

MORGAN, J., dissenting:

With deference to the view of my associates, I do not concur in the reversal. The judgment was just and, for this reason alone, it should not be reversed. The irregularities complained of occurred by reason of the desire to reach the truth at the trial, and not in a single instance did the lower court commit any irregularity that affected the substantial rights of the parties.

The majority opinion says the action is for damages for the breach of a contract; but the complaint and the evidence, from my view, were for damages on account of the fraud practiced upon the plainitff, the negotiations concerning the contract being only a statement of a part of the circumstances constituting the fraud charged. The complaint as construed by the court and the evidence comprise three charges of fraud, chronologically stated:

First, that plaintiff was induced, by the fraud and deceit of Hitchcock, to purchase 21,000 shares, by being led to believe that Hitchcock had conveyed to the company about $50,000 worth of real property for 56,000 shares, the remaining 54,000 being treasury stock that was being sold to raise money to build a bath house on the real property; when in fact the 56,000 shares had been issued without consideration and the company did not own any real estate, but plaintiff's $21,000 was used to take up options the company had on it.

Second, that the plaintiff's wife, as a stockholder, brought suit to require an accounting for the treasury stock, of 54,000 shares, and to require the 56,000 shares to be returned to the company by Hitchcock, on the ground

that such shares were issued without consideration, and to enjoin any transfer thereof. Temporary injunction was issued, and was never dissolved, so far as this record shows. An accounting was made by Hitchcock, as to the treasury stock, and judgment entered against him in favor of the company for $24,308.59, which it was found he owed the company on treasury stock disposed of by him, but no adjudication, further than the injunction, was had as to the 56,000 shares. That during the pendency of that suit, Creighton and another were elected as two of the three directors, by voting the 56,000 shares, in disregard of the vote of the 21,000 shares of the plaintiff, in August, 1907; that in February following, the two directors aforesaid, having in the meantime taken possession of the books of the company and having assumed the absolute control and management of the company's affairs, plaintiff refusing to act, amended the by-laws, set a new date for annual meetings, and by the vote of the same stock, transferred, in the meantime to Creighton without consideration, elected three directors, consisting of Creighton and two others, who in March following, made a fraudulent assignment for the benefit of creditors; that plaintiff sued them and the assignee, alleging the fraudulent purpose of the assignment and asked an injunction against the assignee from further proceedings therein. Considerable evidence was introduced herein, tending to prove the fraudulent purpose of this assignment.

Third, that, in order to settle all differences between the plaintiff and Creighton, and to satisfy the plaintiff's rights and claims, Creighton proposed to plaintiff, and, it is alleged that he agreed, of plaintiff would desist from prosecuting his action against the assignee, and drop all other litigation, that he, Creighton, would organize a new company—after the assignment proceedings had been first closed, the property sold, and the assignee discharged—and have the purchaser at the assignee's sale transfer all the

property to the new company and have new shares issued to the plaintiff, to satisfy his rights, and to Creighton, and other stockholders to satisfy their rights, and to pay them for the money actually invested, and that he, Creighton, would build a $30,000 bath house, apparently from the sale of stock in the new company. That after the assignment was closed, and the property transferred to the new company, Creighton refused to go any further with the alleged contract, and refused to recognize the plaintiff's rights thereafter, but issued all of the shares in the new company to himself, except three shares, of one dollar each, one to ach of the three directors thereof, thus completely ignoring plaintiff, who was thus deprived of his money and of all interest in the property into which it had been converted.

These allegations were immediately followed by a closing statement in the complaint: "that *by said acts* of the said defendants and each of them this plaintiff has been damaged to the amount of $40,000." The court submitted the negotiations concerning the contract as a part of the "said acts."

Plaintiff introduced his testimony in the order of the allegations in the complaint, showing that he had been deceived in the purchase of the stock originally; that the defendant Creighton had oppressively and fraudulently used the 56,000 shares of stock, which it clearly appeared were issued without consideration to Hitchcock, and had been transferred to Creighton with such knowledge, and, by such use of it, he had thereby oppressively and fraudulently obtained absolute control and management of the company, and had fraudulently made the assignment for the benefit of creditors, and, through the negotiations concerning the contract, had lulled the plaintiff into security, and caused him thereby to refrain from pressing his suit against the assignee, and thereafter by the sale and transfer of property, had converted to his own use, and the use of the defendant company, all of the property of the old com-

pany, without paying anything to the plaintiff, or to anyone else, for it, except about $12,000 that was bid for the property at the assignee's sale, which was used to pay off indebtedness of the company, consisting of $5,000 due Creighton for claims allowed by the assignee and assigned to him, and of about $7,000 borrowed money and other claims and expenses. Thus showing plaintiff's damage, through and by reason of the various acts of fraud charged, and measured by the interest plaintiff had in the property so fraudulently obtained by the defendants, plaintiff obtained judgment for an amount much less than the value of the property, after deducting the $12,000 Creighton paid for it at the sale, and less than the value of his interest therein.

It is true the lower court instructed the jury that plaintiff had failed to prove an absolute contract of settlement and told counsel, on overruling a motion for judgment for the defendants and nonsuit, at the close of plaintiff's case, that he would submit the negotiations concerning the contract to the jury, and he did afterward so instruct them, for their consideration, in so far, only, as such negotiations would throw light upon the fraud charged against the defendants. The defendants, without objection to such statement of the court, proceeded to introduce their testimony in defense of the charges of fraud, and made no objection to the instruction, aforesaid, thus acquiescing in the ruling of the court, and accepting the issue thus made, upon the question of fraud. The verdict of the jury was against them for only $15,550, which the jury, no doubt, considered the actual value of plaintiff's interest in the property so taken from him by the defendants.

Thus it appears that the action was not for a breach of contract, and even if it were partially so, as originally stated in the complaint, the court narrowed and limited the issues to the one question of fraud, and submitted the negotiations concerning the contract for the jury's consideration as to the fraud charged against the defendants.

Such narrowing of the issues was not only a wise action on the part of the lower court, but was acquiesced in by the counsel for the defendants, as shown by three things: First, they denied in an amended answer, "that the defendant, Creighton, made the representations to the plaintiff alleged in paragraph 6," in reference to the contract, and denied "that the plaintiff did or refrained from doing any matter or thing whatever by reason of the alleged agreement or any agreement with the defendants"; thus aiding the complaint, and showing an actual joinder of issues concerning the effect of these negotiations; second, the defendants introduced their evidence on the issue of fraud, thus accepting such issue; third, the defendants made no objection whatever, and saved no exception, to the instruction of the court submitting the negotiations concerning the contract for whatever light they might throw upon the charge of fraud, thus acquiescing in the issue submitted.

All negotiations concerning the contract (which included Creighton's offer to pay and satisfy plaintiff, and to persuade him to drop his suit against the assignee and the directors who made the assignment, one of whom was Creighton, by the transfer to plaintiff of a sufficient number of shares in the new company to be organized) were pertinent facts, tending to prove a consequent admission of the fraud charged; an acknowledgment of plaintiff's rights and interests. If the 56,000 shares had not been fraudulently used to control the company, if the assignment was in good faith, why were these negotiations carried on, the purpose of which was to stop the suit against the assignee, and to settle with plaintiff? And if the negotiations were in good faith, why were they so completely repudiated after the defendants obtained the property? The court properly submitted these negotiations to the jury as part of the fraud charged.

Thus it not only appears that the non-suit was properly denied, but that the defendants waived the alleged error in

refusing it, although the majority opinion concludes that the overruling of the motion for a directed verdict and non-suit was sufficient to reverse the case.

The defendant, Creighton, stated in his answer that he did not have and could not obtain sufficient knowledge or information upon which to base a belief, as to the allegations, that he never did at any time own to exceed 220 shares of stock in the company. This must be taken as an admission that he never owned the 56,000 shares with which he obtained control of the company, and the court so instructed the jury, and defendants made no objection and saved no exception thereto.

The evidence for the defense consisted almost entirely in an effort to prove the necessity and validity of the assignment, and the proceedings therein terminating in the assignee's sale. They did put plaintiff on the witness stand, and he reiterated that he was deceived and fraudulently induced to buy the shares in the company; that the 56,000 shares were originally issued without consideration to Hitchcock, then to his brother Dean, and then to Creighton; that the assignment was illegal, and a majority of the claims filed in that proceeding were illegal; that the having of the 56,000 shares by Creighton at the annual meeting and his assuming control was one cause of his loss and damage, together with the testimony that he did nothing to hinder the assignee's sale, and that Creighton and the company now had all the property that was paid for with his money.

They did not put Creighton or any one of the directors of the defendant company on the stand. They ought to have been able to testify, if it were true, that they were not guilty of the fraud charged. They knew whether the 56,000 shares were fraudulently used to obtain control of the company and to make the assignment, and to thus obtain all the property of the company. Their failure to testify must have been considered by the jury. It was a circumstance far from favorable to Creighton, or to the three directors,

all of whom had been Creighton's attorneys in regard to matters involved in this suit.

The majority opinion concludes that the judgment should be reversed, because the court in stating the issues made by the pleadings made misstatements prejudicial to defendants.

The entire scope and purport of the complaint was to state facts constituting the fraud by which plaintiff was deprived, first of his money, and afterward of the property purchased with his money, and that the defendant Creighton had knowledge of those facts, did them himself, or consented to and approved them, and accepted the fruits thereof; and the instruction relied upon as reversible error was a general statement of the allegations as construed by the court, and could not have deprived the defendants of any substantial right. The same may be said as to the part of the 7th instruction, considered as reversible error, with the additional reason that defendants made no objection and saved no exception to it. They acquiesced in it. As to instruction No. 9, wherein the court included Creighton as a director making the $1500 loan, this was a mistake, as he was not a director then. It was quite immaterial, however, whether he assisted in making this loan; the charge was that it was made contrary to the by-laws of the company, and over protest. The jury could not have been misled by this very slight mistake. Furthermore, it is corrected by other instructions where it is plainly stated that Creighton first became a director in August, 1907, a year after the said loan; and, in another instruction, the directors' names are stated who made this loan. There was no such assuming of the existence of evidence here as referred to in the authorities cited in the majority opinion.

It is then concluded in the majority opinion that reversible error was committed in the same instruction by instructing that Creighton could not become a "director" under the by-laws without he owned 1000 shares, when the

allegation was that no one could become an "officer" without owning 1000 shares. The evidence disclosed that Creighton was a director and an officer—vice-president—elected by Hitchcock's voting the 56,000 shares for him before he even claimed to own but 220 shares. These are infinitesimal technicalities, and if the reversal of this judgment be based upon such errors, then it is doubly true that "mortal vision is a grievous bar to perfect judgment." It may be exhilarating and pleasing to exercise the mind and stimulate the ambition, in working out the enigmas of technical procedure, but it is "our pleasant vices that make instruments to scourge us."

The majority opinion says that "it does not appear that the transfer to Creighton of the 56,000 shares was without consideration nor merely colorable; therefore, *prima facie,* he had the right to vote the stock and act as a director, even though he was a merely nominal owner." But he admitted in the pleadings, and the court instructed the jury without his objection or exception, that he never owned to exceed 220 shares. This admission is clear and was certainly intentional, because an amendment was made to the answer for the specific purpose of denying, directly, allegations of the complaint, and this allegation was denied again on information and belief. The certainty of such intention to admit is shown by the fact that no objection was made to the instruction telling the jury such fact was admitted. Creighton did not testify at all, and he did not allege that they were ever paid for, and the plaintiff proved that the only way Creighton ever became a director was by the vote of these shares, over the vote of plaintiff's 21200 shares; and that by these shares another director who never owned 1000 shares was elected, constituting a majority of the board, and that these two changed the by-laws, set another date for an annual meeting, elected three directors at an annual meeting "held in accordance with the new by-laws," made an assignment for the benefit of creditors,

and thereafter sold the property and conveyed it to the new company, and issued all the stock therein to Creighton, except three shares. Now, where is the *prima facie* right even to act as a director, to say nothing of what he did thereafter?

Another error is found in the 9th instruction: that the court told the jury if they believed Creighton claimed to own the 56,000 shares, and at the same time knew that the same had not been paid for, and knew of the fraudulent representations of Hitchcock and the old company, such claim would constitute a fraud. The majority opinion says this was error, because "it is not alleged nor proved that Hitchcock did not cause the real estate to be conveyed to the company before he assigned the stock, or it came into the hands of Creighton." This was not error. The instruction is too favorable to defendants. They admitted that Creighton never owned these shares. Creighton did not allege, nor testify, that he did, but admits he did not; and, to the charge that he never owned to exceed 220 shares, he says in his answer that he did not have sufficient knowledge or information upon which to base a belief. Furthermore, he became a director and vice-president of the company, and acted as such, for about five months before he ever claimed to own but 220 shares, thus having ample knowledge of the company's affairs, and especially as to whether these shares had ever been paid for; for, before he voted them for himself and the other two directors, and while he was a director and vice-president, the judgment for $24,000 was obtained for the company against Hitchcock for the balance Hitchcock owed the company on his disposition of the 54,000 shares of treasury stock, rendered on a report of a referee that showed conclusively that Hitchcock had never paid the company anything for the 56,000 shares, but lacked $24,000 of having turned over property to the company as the equivalent of the 54,000 shares of treasury stock. Furthermore, the referee's report showed that

plaintiff's money had been used to pay for about all the property the company owned at that time. Furthermore, the complaint in that case alleged Hitchcock's fraud; and a director and vice-president would know of all the proceedings in a suit in which his company obtained a judgment for $24,000, and would know that Hitchcock never did transfer any property to the company for the 56,000 shares. And defendants do not deny in the instant case the allegations of Hitchcock's fraud, and that he never paid anything for these shares, but only deny that they knew it.

The majority opinion says this judgment of $24,000, *prima facie,* settled all issues in that case and "left the stock standing in the name of Hitchcock's assignees ,including Creighton." Now, Creighton never claimed these shares at that time; this judgment was obtained in January, and the only evidence indicating that these shares were ever even transferred to him was plaintiff's testimony from a memorandum that the books showed a transfer February 7, 1908, about 12 days after the judgment, and 3 days before Creighton voted them for himself, as director. So Creighton was not an assignee when the judgment was entered. As to the money judgment, *prima facie,* settling all issues, the record in that proceeding showed the contrary; after a temporary injuiction was issued as to any transfer of these shares, Hitchcock filed an answer, saying he had transferred the shares to his brother before he knew of the injunction; and the court appointed a referee, and ordered an accounting as to the 54,000 shares of treasury stock, and in such order all other issues were continued until the report of the referee was made, upon which the court rendered the judgment for $24,000, without any adjudication concerning the 56,000 shares, neither Hitchcock's brother nor Creighton being defendants.

And even if the 56,000 shares were left in Hitchcock's brother as assignee, there was no adjudication that he owned them or that they were not assigned without con-

sideration, but, on the contrary, no finding or adjudication was made concerning them; nor would such leaving of the shares in the said assignee's hands overcome the admission of Creighton that he never owned to exceed 220 shares, or his admission of the charge that Hitchcock never paid anything for them, coupled with his failure to testify on any issue.

The majority opinion says that the judgment should be reversed, because the court instructed the jury that if they believed all the matters or things set forth in the complaint were done by or with the knowledge and consent of Creighton, and in furtherance of Hitchcock's fraud upon plaintiff, they should find for the plaintiff. This was not error, first, because it was favorable to defendants. It required the jury to find that all of the matters and things were done to defraud the plaintiff; second, if Creighton adopted, carried on and used for his own benefit the fraud of Hitchcock, together with the things he did, on his own initiative, thereafter, the verdict should have been for the plaintiff; third, other instructions clearly define the issues so that this instruction is made clear to the jury.

The majority opinion says that the lower court, by instruction No. 10, committed fatal error "in that it did not give the proper measure, or any measure, of damages." One reason why such alleged omission to instruct was not reversible error is that the defendant did not ask for any such instruction, never objected to the instruction given for this reason, and never called the court's attention to the matter, but objected only on the ground that no instruction at all, as to damages, should have been given. It is true that there are instances where the court should give such an instruction, of its own motion, but this is not one of them. In the case of *Mustang Co. v. Hissman*, 49 Colo., 308, 112 Pac., 800, and *Colo. Spgs. Co. v. Albrecht*, 22 Colo. App., 201, 123 Pac., 957, cited in the majority opinion, there was a clear dispute at the trial as to the proper measure

of damages, and a proper instruction was refused, and the issue was the amount of damages actually sustained. In such instances the court should guide the jury by appropriate instructions. In the present case the contention of defendants is, and was at the trial, that no damage was sustained and none proved. Furthermore, if the court had given to the jury such an instruction it could not have caused the jury to find a verdict for a less amount under the evidence.

There was no reversible error pertaining to the answer of the jury to the special interrogatory, for two reasons: First, the answer discloses only one way in which plaintiff was damaged, if it discloses any way that he was *damaged*, and is not, therefore, inconsistent with the general verdict. The answer discloses one of the ways in which the plaintiff was defrauded rather than damaged, but two more charges of fraud were made upon which the verdict may stand. If the answer does not exclude every other conclusion that will authorize a recovery for the plaintiff, then it is not inconsistent with the general verdict; and if not inconsistent, the general verdict should stand. 2 Thompson on Trials, 1958 (2nd Ed.); *Drake v. Justice G. M. Co.*, 32 Colo., 260, 75 Pac. 912. The special findings will not control the general verdict "unless invincibly antagonistic to it." Thomp. on Tr., 1962, 1967; *D. & R. G. R. R. Co. v. Bedell*, 11 Colo. App., 140, 54 Pac., 280. Second, the interrogatory was confusing and misleading, as the answer shows. If the question had been how was the plaintiff defrauded, it would have been responsively answered in part. But that was not the question, and the answer was therefore indefinite. The question propounded was intended to elicit a different response. Counsel should have required the jury to answer it, if possible. The question was confusing also because it did not call for a "particular question of fact," as the Code provides. Special findings of facts by a jury are often wise precautions, but in order that they may not be used to con-

fuse and to furnish error, they should be made only as to definite and particular questions of fact, and not as to the evidence on which a question of fact is based.

The majority opinion concludes that the defendants were denied a substantial right because the trial did not proceed in all respects in compliance with the orderly procedure designed for the purpose of making up issues for trial and for the conduct of trials. The trial of this cause required about nine days in the lower court, and there are in the record many instances that required discretion, but the only actual deviation from reasonable regularity consisted in the action of the lower court in submitting to the jury the consideration of the negotiations concerning the alleged contract; but, as has been shown, this was a wise and reasonable thing to do, and counsel for the defendants acquiesced in it. Furthermore, the statute provides, in reference to appeals, that the Supreme Court "shall disregard any error or defect in the pleadings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." Sec. 20, Sess. Laws 1911, Ch. 6. The entire purpose of that act was to facilitate the speedy determination of causes and to lessen, if not prevent, the reversal of causes for technical reasons. Few provisions of the statute have been so frequently cited, and so infrequently obeyed. The re-enactment in 1911 of that statute is a plain reminder that a similar statute, that had been in existence since 1877, had not been receiving the attention that the legislature intended. Technicalities should never be used to reverse a just judgment. The reversal of this judgment, in my opinion, cannot be based upon anything except that it was not found according to certain rules. In a very recent case, *Taylor v. Thomas*, 77 N. H., 410, 92 Atl., 740, the Supreme Court of New Hampshire said:

"It is now universally recognized that the object of a trial is to ascertain the truth by rational means. The sport-

ing theory—the theory that a judicial trial is a game to be played according to certain rules—has no more place in the present conception of the administration of justice than has the wager of battle."

Just judgments are too frequently reversed because learned members of the bar boldly assert some technical rule, and so plausibly maintain it with citations and argument, based upon iron clad rules handed down to us from past ages, that the courts, sometimes in fear of reversal by a still higher tribunal, sometimes from the mistaken belief that it is the law, and in some few instances from a lack of extended consideration, adopt such technical precedents and reverse just judgments because they were not recovered with that degree of nicety, science and art that does sometimes so adorn judicial procedure that even an unjust judgment is permitted to stand.

The majority opinion concedes that something might have been done by the lower court to permit the plaintiff to share in the stock of the new company; but plaintiff was not compelled to sue for a part of such stock, and the lower court sustained a money judgment, as sued for, which conferred the same benefit, and which defendants seemed to prefer, by acquiescing in the issues.

It is true, as the majority opinion indicates, that the record contained intimations of plaintiff's ignorance. It clearly shows, also, his innocence; that he was not a shrewd man; that he knew nothing about the law, and that he was easily influenced and without ingenuity; "there are no tricks in plain and simple faith."

Remanding for another trial means further expense to plaintiff, the necessity of delay, another opportunity for defendants to defeat a just cause, simply to require a more rigid enforcement of the technical rules of pleading and practice. Such rules, like the statute of frauds, have been adopted to prevent fraud and injustice, not to permit and promote them.

In 1 Thompson on Corporations, sec. 870, it is said:

"For the clearest reasons, the officers of a corporation will not be permitted to issue the stock belonging to the company to themselves, with the design and for the purpose of retaining themselves in office. * * * So, directors were enjoined from issuing new stock immediately prior to an election for the sole purpose of controlling it. * * * They show a clear case of fraud upon the rights of the existing stockholders."

For a much greater reason, is it fraud for directors to elect themselves by the vote of shares that have never been paid for, with their knowledge.

Fraud is not readily classified or defined and the courts usually avoid attempting it; it "is so various in form and color that it is difficult, if not impossible, to confine it within the limits of any precise definition." Kerr on **Fraud** and Mistake, page 42.

This author further says:

"The fertility of man's invention in devising new schemes of fraud is so great, that courts of equity have declined the hopeless attempt of embracing in one formula all its varieties of form and color, reserving to themselves the liberty to deal with it under whatever form it may present itself."

In the case of *Hanger et al. v. Evine et al.*, 38 Ark., 334, 346, the court said:

"The criterion is the good sense of the jury, estimating the character of the transaction by applying to the evidence their general knowledge of human motives, and their sense of dealing. Fraud is manifold in its devices, and its ingredients cannot be so defined as to include all cases, save by such general statements as must, after all, refer the question to the judgment of the jury upon the facts. Twelve men, taken from the mass of citizens, will rarely fail to detect a fraudulent intent, if any such existed, from all the circumstances."

In the case of *Kirby v. Ingersoll*, 1 Har. Ch. 172, 190, a case in which one partner, without the consent of his co-partner, made an assignment for the benefit of creditors, the court said:

"By the term fraud, it should be remembered that the legal intent and effect of the acts complained of is meant. The law has a standard for measuring the intent of parties, and declares an illegal act, prejudicial to the rights of others, a fraud upon such rights, although the parties deny all intention of committing a fraud."

Creighton's failure to testify had its weight with the judge and jury.

"The failure of a party to testify in his own behalf as to disputed matters within his personal knowledge warrants the inference that his testimony would be unfavorable to his contention on those points." 9 Enc. Ev. 969.

"Where a party is charged with fraud and fails to come forward and testify to repel the charge, he generates by his failure an unfavorable presumption against his cause." *Stephenson v. Kilpatrick*, 166 Mo., 262, 65 S. W., 773.

"When it is reasonably within the power of a party to offer evidence upon the facts and rebut the inferences which the circumstances tend to establish against him, and he fails to offer such proof, to rebut same, the natural conclusion is that the proof, if produced, would support the inferences against him, and the jury is justified in acting upon that conclusion." *A. T. & S. F. Ry. vs. Davis et al.*, 26 Okla. 359, 364, 109 Pac. 551, 553.

I think a reasonable and fair administration of justice demands the affirmance of the judgment.

Decided February 11, A. D. 1914. Rehearing granted April 12, A. D. 1915. Judgment reversed. Rehearing denied appellee June 18, A. D. 1915.

[No. 4027.]

SORRELLS V. SIGEL-CAMPION LIVE-STOCK COMMISSION CO.

1. CHATTEL MORTGAGE—*Effect.* In Colorado a chattel mortgage is a conditional sale, becoming absolute on breach of any of the mortgage conditions. (166, 168.)

But the title so created is limited to the chattels specifically described. It does not extend to the subsequent increase of live stock therein mentioned.

2. —— *Of Sheep and "the Increase,"* does not, where possession remains with the mortgagee, pass the young afterwards born; and in no case does it pass the wool afterwards clipped, before breach of the mortgage conditions. If before breach the mortgagor clips and sells the wool, the purchaser takes a title freed of the mortgage lien. (157, 166.)

3. AGISTER—*Who Is—Lien.* Sorrells and Davis entered into an agreement in writing by which Sorrells agreed to sell to Davis a certain acreage of pasture, upon a ranch named, and all the hay upon the ranch not needed for his own use, and Davis agreed "to feed 2,000 head of sheep" on the same ranch, and pay Sorrells a specified monthly rate "for feeding and taking care of said sheep," the compensation to commence "with the delivery of the sheep on said ranch, and continue until the sheep are taken away." Sorrells at the time was part owner of the ranch, and engaged in general farming, as well as in feeding and caring for the sheep of others. The sheep were delivered upon the ranch, and were thereafter under the exclusive care and control of Sorrells. Davis was seldom at the ranch, and only for a brief stay upon each occasion. He assumed no authority or control as to the manner of feeding or caring for the sheep. Sorrells, pursuant to a verbal agreement, bought and fed to the sheep large quantities of hay and grain, in addition to that by him sold to Davis.

Held, that Sorrells was an agister, and under the statute (Rev. Stat., sec. 4013), was entitled to a lien upon the animals for their care and sustenance. (170-173.)

The agreement of Davis "to feed 2,000 sheep" on the ranch, *held* to import merely an obligation on his part to deliver upon the ranch the specified number of sheep, to be fed and cared for by Sorrells. (173.)

4. CONTRACTS—*Construction.* The conduct of the parties, subsequent to their engagement, is to be considered in its interpretation. (173.)

5. APPEAL AND ERROR—*Questions not decided below* will not be considered in the court of review. (175.)

Error to Weld District Court. HON. NEIL F. GRAHAM, Judge.

MR. JOHN T. JACOBS, for plaintiff in error.

MESSRS. GOUDY & TWITCHELL, MR. J. H. BURKHARDT, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

On Rehearing:

This action was begun November 4, 1909, by defendant in error (plaintiff below). The complaint contains three causes of action: First, replevin to recover possession of three hundred and ten head of lambs included within a mortgage upon eleven hundred and three of such animals; second, to recover $1400 for value of wool clipped from the sheep during the life of the mortgage, and before breach of the covenants thereof; third, to recover $1400 for injury and damage done to the lambs by such clipping.

The answer admits the mortgage, possession by defendant Sorrells of the lambs, and his refusal to surrender the same upon demand of plaintiff; but defends the action under a claim that he had an agistor's lien, in the sum of $950, upon the lambs replevined, superior to the lien of the mortgage. The answer also alleges that defendant received into his custody, from the owner Davis, something over two thousand sheep, to be taken care of and fed by him under the terms of a contract dated October 28, 1908, entered into between himself and Davis; that defendant foreclosed the agistor's lien and realized from the sale of the lambs the sum of $600, which he applied upon said indebtedness of $950, leaving a balance still due him of $360; that said plaintiff company, before execution and delivery of the mortgage, had full knowledge of all the circumstances surrounding the delivery of the sheep to him, and the care and feeding of the same. The answer further alleges as a defense that the plaintiff company took from defendant's possession all of the two thousand sheep aforesaid, except the three hundred and ten lambs replevined, and sold the

same for more than enough to pay the entire mortgage indebtedness from Davis; but that instead of applying it to the liquidation of such indebtedness, it applied a large portion of such proceeds first to the liquidation of an open account of $3200 or $3400 existing at the time from Davis to the mortgagee company, which left an insufficient amount from the sum received upon sale of the sheep to pay the mortgage indebtedness. The answer also admits that Davis clipped the wool and sold it to defendant, as charged in the complaint; but claims he purchased the same from said Davis for the agreed price of $1390, and applied that amount upon an indebtedness of $2000 then existing from Davis to himself.

The case was tried to the court without a jury, and the court rendered judgment in favor of plaintiff for the possession of the lambs, or for their value, $1071, in case of non-delivery; also for $1103 damages for conversion of the wool.

This case has been ably prosecuted and defended by the attorneys for the respective parties, and we have given it careful consideration. There is but little controversy as to the facts. It appears to be conceded by counsel for both parties that the disposition of three sharply defined issues is sufficient to determine this appeal:

First. Under our statute, does a chattel mortgage upon sheep, including in terms their "increase," include the wool clipped therefrom in proper season, within the life of the mortgage, and before default, when no mention is made therein of such wool?

Second. Did the relations between Davis and Sorrells warrant an agistor's lien in favor of the latter, under our statute?

Third. If Sorrells was entitled to an agistor's lien, did he waive such lien by his subsequent statements and acts, made and done at or about the time he solicited Mr. Campion, manager for defendant company, to guarantee

the future costs and expenses of feeding the lambs, then in his (Sorrells') possession?

We will discuss the issues in the order named and refer to facts which appear to be established by the evidence as we proceed.

First, did the chattel mortgage include the wool thereafter clipped? At common law all personal property subject to absolute sale could be mortgaged, and it is a general rule of law that a chattel mortgage fastens a lien only upon the specific property therein described. The statutes of California and some other states (not including Colorado) render a chattel mortgage void as to personal property other than that specifically designated by the statute. Section 515, Revised Statutes 1908 of Colorado, provides, among other things, that

"Every mortgage of live stock may cover and bind the increase of such live stock, or any part thereof, thereafter to be born, as may be provided therein," etc.

The chattel mortgage in the case at bar was given upon the following described property:

"All the following described live stock, cattle, and increase thereof and personal property, viz.: * * * Eleven hundred three (1103) head of good Idaho lambs, average weight about 72 pounds, being the identical sheep purchased from B. F. Saunders at Cheyenne, Wyo., Feb. 20, 1909. * * *

Said sheep are at present located in feed lots situated on the Teller's and Sorrells' ranch, located about three miles east of the town of Windsor, Weld County, Colorado," etc.

A construction of the word "increase" found in the mortgage seems necessary. It has been repeatedly construed by text-writers and appellate courts in various jurisdictions, and the almost unanimous conclusion reached is that the term "increase," when used in chattel mortgages upon sheep and other live stock, refers exclusively to the progeny or young of such animals, and does not include

wool grown on sheep, milk taken from cows, etc., during the life of the mortgage and before foreclosure, or before breach of the mortgage covenants, and particularly so when the possession remains in the mortgagor under the terms thereof. We find no text-writer, and but one case, holding to the contrary, viz.: *Alferitz v. Ingalls,* 83 Fed., 964 (decided December, 1897), in which an oral opinion was delivered by the trial judge. He held that the term "increase," in a chattel mortgage of sheep, included the wool grown on the sheep within the life of the mortgage and before default. That case involved the construction of a chattel mortgage executed in California. It appears to stand alone, and is in direct conflict with the modern decisions of that state. The mortgage there contained the clause "eight thousand sheep and the increase thereof." A few excerpts from the cases next hereinafter mentioned will be sufficient to show that other courts are not in harmony with this Federal decision in its construction of the word "increase."

The case of *Alferitz v. Borgwardt,* 126 Cal., 201, 58 Pac., 460 (decided September, 1899), judicially interprets and defines the meaning and effect of the term "increase" when used in mortgages of live stock. The mortgage there expressly mentioned a drove of sheep and their increase. That case directly involved the right of a mortgagor to clip and sell the wool grown on the sheep after execution of the mortgage and before foreclosure. The mortgagee sued to recover the value of such wool. The court said, in part:

"Section 2955 of the Civil Code, so far as material here, reads as follows: 'Mortgages may be made upon the following personal property, and none other: * * * 16. Neat cattle, horses, mules, swine, sheep, goats, and the increase thereof.'

In addition to the fact that the presumption is against the right to mortgage personal property, and permission so to do must be clearly found in the statute, it must be ad-

mitted that the word 'increase,' although variously used, has acquired a special meaning when applied to domestic animals. So applied, unless expressly qualified in the context, it invariably means the young of such animals. Counsel has not found, and I venture to say cannot find, in legal literature or elsewhere (save, perhaps; in the mortgages of this class, and in *Alferitz v. Ingalls* (C. C.), 83 Fed. Rep., 964), an instance where the unqualified use of the word, as applied to such animals, included anything more or meant anything other than the offspring, progeny or young of such animals. * * *

When we speak of the increase of a herd of cattle or a flock of sheep, we refer to growth of the herd or flock by addition of new members. * * * The wool does not increase the flock of sheep."

In *Stringfellow v. Sorrells,* 82 Tex., 277, 18 S. W., 689, the court defined the meaning of the word increase, when applied to live stock, using, in part, the following language:

"As applied to live stock belonging to the wife, 'the increase' of such property has been invariably (ever since the decision of the Supreme Court in *Howard v. York,* 20 Tex., 670) recognized in the reported cases to denote the progeny of the original stock or their descendants. This construction comports with the etymology of the term, and accords with the universal understanding."

To the same effect, *Cox v. Beck et al.* (C. C.), 83 Fed., 269, *post.*

The mortgage in the case at bar specifically mentioned the "increase," but not the wool, and we are satisfied, from the authorities cited, as well as upon reason, that the word "increase," as there used, did not extend the lien of the mortgage to the wool grown on the sheep subsequent to its execution, when clipped and sold by the mortgagor while the sheep were in his possession, and before breach of any of the mortgage covenants.

There are two lines of authority as to the effect of a chattel mortgage upon the title of the chattels mortgaged. Some states, including Colorado, hold the mortgage to be a conditional sale, passing title to the mortgagee, which becomes absolute upon breach of any of the mortgage covenants, while others hold that the mortgage is only a lien, the title remaining in the mortgagor until foreclosure or possession taken for that purpose. California and Montana belong to the latter class, and in its earlier cases Oregon followed the same rule, but now it appears to be in the former class.

In *Shoobert et al. v. DeMotta*, 112 Cal., 215, 44 Pac., 487, 53 Am. St., 207, decided March 31, 1896, the Supreme Court held that in chattel mortgages upon sheep, nothing being stated therein concerning the increase, the lien was not extended to the after-born young. The court said:

"In the absence of any express agreement upon the subject, the lien created by a mortgage is limited to the property which is described in the mortgage, and does not include other property of the same character which the mortgagor may have afterward acquired and placed with the mortgaged property. (Jones on Chattel Mortgages, Secs. 138, 154). If the mortgagor retains the possession of the mortgaged property, he is at liberty to deal with and use it as its owner, and whatever income or profit may be derived from such use belongs to him, and not to the mortgagee."

While in that case the question of title to wool is not involved, the decision is pertinent, in that it recognizes the rule that in the absence of an express condition a lien created by a chattel mortgage is limited to the property therein described. The decision further appears to lay stress upon the fact that if the mortgagor of live stock by the terms of the mortgage retains possession of the same, he is at liberty to deal with and use it as its owner, and is entitled,

as against the mortgagee, to whatever profit or income may be derived from such use.

In the case of *First National Bank of Santa Ana v. Erreca et al.*, 116 Cal., 81, 47 Pac., 926, 58 Am. St., 133 (decided February, 1897), the chattel mortgage on sheep did not refer to either increase or wool. Before default the mortgagors clipped fourteen thousand pounds of wool from the sheep and sold it, and also sold some eight hundred head of lambs that had been born subsequent to the giving of the mortgage. The court held that the lien of the mortgage did not extend to either the subsequently born lambs or the wool grown on the sheep and clipped after the execution of the mortgage and before foreclosure, the court saying, in part:

"The superior court erred in holding that the wool sheared from the sheep and their increase was covered by the mortgage and subject to its lien. * * *

The provision in Section 2955 of the Civil Code, authorizing the execution of a chattel mortgage upon 'sheep, and the increase thereof,' does not extend the lien of a mortgage upon 'sheep' to the 'increase' of the sheep, but implies that unless the increase is covered by the terms of the mortgage it is not included therein."

The decision further held, on principle, as announced in *Shoobert v. DeMotta,* that the lien of the mortgage did not apply to lambs in gestation at its date.

Upon this point *Alferitz v. Borgwardt* also involved the right of a mortgagee to the wool grown on the sheep after execution of the mortgage and before foreclosure. The mortgagee sued to recover the value of the wool clipped from the sheep, alleging in the complaint that defendant had converted it to his own use. The court held that the lien of the mortgage was not extended to the wool, saying:

"It is assumed on both sides that the wool was not taken from the actual possession of the plaintiff. * * *

It is also to be presumed that when the mortgagor retains possession of the sheep, he expects to make a profit from the sheep in the meanwhile. He certainly expects to make a living from such use and to pay his debt from it; as much so as one who mortgages his farm and retains possession. Upon the subject of use the intendments are the same. This idea is expressed in *Shoobert v. DeMotta, supra,* and it is said that where the increase are not mentioned, the mortgagee might as well claim the wool as the lambs, as each may be the annual profit which the mortgagor in possession is entitled to retain unless the contrary intent is expressed. This reasoning equally applies to the statute."

In *Demers v. Graham, Sheriff, et al.,* 36 Mont.. 402, 93 Pac., 268, 14 L. R. A. (N. S.), 431, 122 Am. St., 384, 13 Ann. Cas., 97, the court held that a chattel mortgage upon cows did not extend the lien to calves in gestation at the time the mortgage was executed, where no reference was made therein to "increase." The court said:

"The law is well settled in this state that a chattel mortgage only creates a lien and does not pass title from the mortgagor to the mortgagee. * * *

Growing crops may be the subject of chattel mortgage, even though the owner of the same also owns the land upon which they are growing. And this rule prevails even in those jurisdictions where growing crops are part of the realty. * * * Now, it will not be contended that a grant of the land would not pass title to a growing crop. So, too, the sale of a cow would undoubtedly carry with it her unborn calf; but we cannot assent to the conclusion that because thereof, a chattel mortgage describing the cow only would also create a lien upon her offspring. * * * We think if the legislature had intended that the lien of a chattel mortgage describing particular animals should attach to their young thereafter to be born, it would have said so plainly, as it did in the case of a pledge. In the absence of such a declaration it seems reasonable to hold that because

the mortgage is simply a lien passing no title, the mortgagor in possession has the right to deal with the property as his own, and in the case of domestic animals may dispose of the young not mentioned in the mortgage as he sees fit. This construction leaves to the mortgagee the security described in the mortgage, and does away with the confusion that experience has taught invariably follows the adoption of any other rule. If, in cases like this, it be intended to include the offspring, the mortgage should so state."

The court there quoted at great length from *Shoobert v. DeMotta and First National Bank v. Erreca, supra,* and adopted the conclusions and reasoning of the same. While the case does not involve the question of wool clipped from the sheep after execution of the mortgage, it clearly holds that if the mortgage fails to specifically refer to the afterborn progeny of the mortgaged cows, even though in gestation, the mortgage lien is not extended to the same.

Notwithstanding these authorities, defendant in error contends with great force that the wool upon the sheep was a constituent part of the same, and that under the rule adopted in this state the title to the lambs passed to the mortgagee upon the execution of the mortgage, and therefore the title to the wool also passed; hence, the mortgagee was the lawful owner of the wool and was entitled to possession thereof, as against Sorrells, the purchaser—citing authorities that seem to sustain its position, of which the most direct and positive is *Alferitz v. Ingalls, supra.* We have already stated that the opinion in that case was an oral one, and is in direct conflict with the Supreme Court of California, as well as those of Oregon and Montana.

In *Knowles v. Herbert,* 11 Ore., 240, 4 Pac., 126, the rule was announced as follows:

"That (mortgage) lien has not been foreclosed, and it is conceded in the argument for appellant to be the settled law in this state that a chattel mortgage, until it has been foreclosed, conveys no title or interest in the property

covered by it, except a mere lien to the mortgagee."

However, a subsequent Oregon decision, *Case Threshing Machine Company v. Campbell,* 14 Ore., 460, 13 Pac., 324, repudiates the rule as there stated, the court saying, in part:

"It may be well said, as in the two cases referred to (*Chapman v. State,* 5 Ore., 432, and *Knowles v. Herbert, supra*), that a chattel mortgage simply creates, in the outset, a mere lien upon the property, and vests no title in the mortgagee; but that cannot be said after the conditions of the mortgage are broken. * * *

It will, I think, be observed in *Chapman v. State,* and *Knowles v. Herbert, supra,* that the broad declaration there made * * * was not necessary to the decision of the first of said cases, nor appears to have been to that of the second. * * * The Michigan courts come nearer to supporting it than any other of the state courts; but they only say that the title does not become absolute until foreclosure. * * * It is evident to my mind that the court went too far in those cases."

So it would seem that Oregon subsequently changed its position, and in lieu of the doctrine laid down in *Chapman v. State* and *Knowles v. Herbert, supra,* adopted a rule analogous to the one prevailing in Colorado.

In *Mayes v. Stephens,* 38 Ore., 512, 63 Pac., 760, 64 Pac., 319, it is said:

"It was formerly held in this state that a mortgage of chattels created only a lien upon the property affected thereby, * * * but it was subsequently determined that upon a breach of the condition of a chattel mortgage, the mortgagee thereby secured a qualified ownership in the property," etc.

It is also said in *Culver v. Randle,* 45 Ore., 491, 78 Pac., 394:

"The rule is settled in this state that a chattel mortgage is a conditional sale of personal property, and after

breach of its terms a mortgagee has such a qualified right to the property as to enable him, under an allegation of absolute ownership, to maintain an action of claim and delivery for its possession."

In logical sequence of the discussions it is well now to refer to another Federal case, *Cox v. Beck et al.* (C. C.), 83 Fed., 269, decided in September, 1897, three months before *Alferitz v. Ingalls*. The case involved the construction of a chattel mortgage executed in Oregon, and the conclusions of the district judge were diametrically opposed to those announced in *Alferitz v. Ingalls*. A number of chattel mortgages were executed upon sheep in that state. In addition to determining the priority of such mortgages, the court held that under a mortgage given upon sheep and their increase, not mentioning wool, the mortgagee *at time of taking possession for foreclosure*, was entitled not only to the young lambs born after the mortgage was executed, but also to the wool then on the sheep; but that, *prior to the time of taking such possession*, a purchaser of wool grown on the sheep subsequent to the execution of the mortgage took title to the same free from the lien of the mortgage. The court said, in part:

"The increase of such property at the time the mortgagee takes possession for the purpose of foreclosure is necessarily covered by the mortgage, but this rule is limited to cases where it is impracticable or unnatural to separate the increase from the original stock. Lambs, as such, go with the ewes; but when they are grown they are not within the mortgage of the flock, unless they are made so by the express terms of the instrument. More especially is this so where they have been separated and sold. So, of the fleece, the mortgagee cannot be expected to shear the mortgaged sheep for another's benefit; but when the fleece is shorn, and sold by the mortgagor in possession, the purchaser takes without reference to the mortgage. The com-

plainant, therefore, has no claim upon the proceeds of the wool clip of 1895."

From the California and Montana cases above cited it will be observed that although those states adhere to the lien rule, they, nevertheless, hold, under statutes similar to our own, authorizing chattel mortgages upon live stock and the "increase" thereof, that such a mortgage, wherein no mention is made of after-grown wool, does not extend the lien thereto, even though the mortgage specifically includes the "increase;" and, further, that under such a mortgage the mortgagor has a legal right to clip and appropriate to his own use the wool grown on the sheep prior to foreclosure, if by the terms of the mortgage he retains possession of the sheep. In the Oregon cases, however, as well as in *Cox v. Beck et al.*, above cited, we have authority directly applicable to the situation existing in the case at bar. Those cases clearly show that Oregon adopted the same rule which obtains in Colorado, namely, that a chattel mortgage is a conditional sale, which passes title in the mortgaged chattels to the mortgagee upon execution and delivery of the mortgage, which title becomes absolute only upon breach of the mortgage covenants. From those cases it will be at once seen that under the conditional sale rule a chattel mortgage on sheep, specifically mentioning their "increase," but making no reference to the wool growing on the sheep after execution of the mortgage, and before breach of conditions, does not extend the lien to such wool, if the mortgage provides that the possession of the sheep shall remain with the mortgagor; and if before such breach the mortgagor clips and sells the wool, during the life of the mortgage, the purchaser takes a good title thereto free from the lien of the mortgage. We have examined all the Colorado cases cited by counsel, and discover nothing therein against the Oregon rulings, but are inclined to think they, inferentially at least, are in harmony therewith.

Before commenting on the Colorado cases it might be well to briefly allude to some pertinent facts established by the evidence which appear to be uncontroverted, viz.: The mortgage under consideration was executed February 25th and recorded March 2nd, 1909. Sorrells was part owner of the Teller and Sorrells ranch at the time of his contract with Davis, October 28, 1909, and was a farmer or ranchman engaged in general stock business, the feeding and caring for sheep being a part of such business. Under the contract two thousand head of sheep were delivered by Davis to him on said ranch, for feed and care, prior to the recording of the chattel mortgage. Defendant in error (mortgagee) knew of such delivery, and that Sorrells had possession and was feeding and taking care of the sheep under arrangements with Davis, before it took and recorded the mortgage from him. The wool was sold to Sorrells by Davis (mortgagor) April 27, 1909, and clipped from the sheep about May 7th following. The note secured by the mortgage did not mature until May 25th of the same year. The sheep were in Sorrells' possession and care from January 12th to August 7th, 1909.

The case of *Atchison v. Graham,* 14 Colo., 217, 23 Pac., 876, was an action in replevin to recover mortgaged personal property. By the terms of the mortgage the mortgagor retained possession. After maturity of the note the mortgagee's assignee made an attempt to vest himself with possession of the property, which the court held to be futile. Thereafter it was seized under execution at the behest of a judgment creditor of the mortgagor. Breach of the mortgage covenants had been made, and the mortgagee failed to vest himself with such possession as the statute required, and for that reason alone the court held the levy good as against the mortgagee. The court said, in part:

"A chattel mortgage is in law a conditional sale of chattels, and operates to transfer the legal title to the mortgagee. Upon breach of the condition the title becomes abso-

lute, and the mortgagee may *then* treat the mortgaged property as his own." (Italics ours.)

The case of *Hurt v. Hubbard,* 41 Colo., 505, 92 Pac., 908, was an action in trover for conversion of mortgaged personal property. In this case also default in the payment of the mortgage debt had occurred. The court held that after such default the title became absolute in the mortgagee, who had the right to take possession of the property and sell the same under the terms of the mortgage. The court said, in part:

"A mortgage of chattels is a conditional sale thereof, whereby the legal title is vested in the mortgagee subject to the right of the mortgagor to perform the conditions imposed by the mortgage. Upon violation of such conditions the title of the mortgagee becomes absolute, and he is entitled to take and hold possession of the mortgaged chattels for the purpose of sale," etc.

Here, again, it will be noticed that the debt secured by the mortgage had matured and the assignee of the mortgagee claimed the right of possession of the property against the owner, for the purpose of foreclosure, which claim was upheld.

In *Crocker v. Burns,* 13 Colo. App., 54, 56 Pac., 199, a case of replevin by mortgagee after default, the court said, in part:

"On condition broken, the legal title to the chattels covered by a chattel mortgage becomes absolute in the mortgagee: * * * Especially is this the case where, as in this instance, the mortgagee had possession of the mortgaged property after foreclosure."

From a plain reading of our statute, which authories mortgages upon live stock and their increase to be thereafter born, *"as may be provided therein,"* and from a careful perusal of the authorities cited, we have reached the conclusion:

First. That the use of the term "increase" in the chattel mortgage in the case at bar did not extend the lien of the mortgage to the wool grown on the sheep after its execution and before breach of the mortgage covenants; that during that time the title to the wool remained vested in the owner Davis, and that having clipped the wool from the sheep and sold the same to Sorrells, the latter took a good title thereto, as against the mortgagee.

Second. That while recognizing the law in this state to be that a chattel mortgage is a conditional sale of the property therein described, and passes a qualified title to the mortgagee, still if such mortgage be given upon sheep without express mention therein of the wool thereafter to be grown thereon, the lien of the mortgage will not extend to such wool if the same is clipped from the sheep within the life of the mortgage and before breach of the mortgage covenants, provided the mortgage by its terms permits the mortgagor to retain possession of such sheep until condition broken.

Third. It appearing from the record that under the terms of the mortgage Davis, mortgagor, retained possession of the sheep mortgaged, and while in such possession, before maturity of the mortgage indebtedness, and before breach of any of the mortgage covenants, clipped and sold the wool to Sorrells, the latter took good title to the same, notwithstanding the mortgage, and the trial court erred in ruling that the wool had been converted by Sorrells.

Having disposed of the first question, we will now take up the second. Did the relations between Davis and Sorrells warrant an agistor's lien on behalf of the latter? The proven facts concerning this question, including some repetition, are as follows: Sorrells was part owner of the Teller and Sorrells ranch. At the time of the delivery of the sheep to him he was engaged in general farming, as well as in feeding and taking care of sheep for other people, upon said ranch, for a consideration. Under the contract of Oc-

tober 28th some twenty-one hundred sheep were delivered at the ranch by Davis and placed in the possession of Sorrells for the purpose of feeding and caring for the same, for a compensation, all prior to the recording of the mortgage in question, and the mortgagee (defendant in error), before the execution and recording of the mortgage, well knew of such facts. Sorrells retained possession of the sheep from January to August, 1909, and he first knew of the mortgage after it had been recorded. At all times during the life of the mortgage the sheep were in the exclusive possession, control and dominion of Sorrells. Davis was only at the ranch four times, not staying over an hour at any time. He gave no instructions to Sorrells concerning the sheep, and testified that Sorrells had charge of the feeding of the same, and directed the manner in which they were to be fed, and that there was nobody at the ranch representing him while the sheep were in Sorrells' possession, aside from McCreery, who was there for the sole purpose of doctoring the sheep.

The contract referred to reads as follows:

"Windsor, Colo., October 28, 1908.

This agreement made and entered into by and between Charles Sorrells, party of the first part, and W. C. Davis, party of the second part,

WITNESSETH:—

Party of the first part agrees to sell to party of second part one hundred seventy acres of beet top pasture, on the Sorrells & Teller ranch, at $3.50 per acre; also agrees to sell to party of the second part all hay now on said Sorrells & Teller ranch not needed by himself for feed, at $6.00 per ton, on the basis of 512 cubic feet per ton.

Party of the first part acknowledges receipt of five hundred and ninety-five dollars, payment in full for pasture, and six hundred and five dollars, payment on hay, balance due on hay to be paid at time hay is measured.

Party of the second part agrees to feed 2000 head of sheep on said Sorrells & Teller ranch, and to pay to said party of the first part the sum of one hundred fifty dollars per month as full compensation for feeding and taking care of said sheep, including the hauling of all hay and grain required. Should party of second part conclude to feed pulp he agrees to pay to said party of first part a further sum of fifty dollars per month for hauling an amount of four tons of pulp per day. Should party of second part conclude to pasture any cattle on said ranch he agrees to see that the do not damage or harm adjoining farmers or their property. It is understood that the compensation of one hundred and fifty dollars per month commences with the delivery of the sheep on said ranch, and continues until sheep are taken away.

Party of first part agrees to have corrals and feeding pens in readiness to receive said sheep by the 15th of November.

(Signed) Charles Sorrells,
W. C. Davis."

It is claimed by defendant in error that by the terms of this contract Sorrells was a mere hired servant of Davis, to care for and feed the sheep, and was thereby excluded from claiming the right of an agistor's lien under our statute, which reads:

"Any ranchman, farmer * * * or any other person, * * * to whom any * * * sheep * * * shall be entrusted for the purpose of feeding, herding, pasturing, keeping or ranching, shall have a lien upon such * * * sheep," etc. Sec. 4013, Revised Statutes 1908.

If this contract must be construed in such a way as to deprive Sorrells of any rights possessed by him as a ranchman under the statute; or, in other words, if the contract transposed Sorrells' *status* as a ranchman into that of a common hired servant, as defendant in error contends, there would be some force to their contention. We do not put

that construction upon the contract. It was probably drawn by laymen, and, as usual in such cases, lacks clearness and positiveness of expression concerning the subject-matter. There is apparent ambiguity in the contract, but not to such an extent in our judgment as to exclude Sorrells from his right to invoke the statute as a lien claimant under its provisions. Neither the intent nor purpose to deprive him of such right is manifested by any words used in the contract. It was disclosed at the trial, without objection, that, in addition to the express provisions of the contract, both Davis and Sorrells agreed that if there was not enough hay or feed on the ranch to properly feed the sheep intrusted to Sorrells' care, the latter should purchase other feed from other ranches or places, for feeding, the market price thereof to be paid by Davis. This became necessary, and a large amount of corn, hay and similar produce was secured by Sorrells from other places, and fed to the sheep, all of which was approved by Davis, and his indebtedness therefor acknowledged by him. If all the evidence upon this branch of the case be considered in connection with the contract, it appears strongly to support Sorrells' claim for an agistor's lien. The evidence conclusively shows him to have been a farmer or ranchman by occupation and part owner in the ranch itself, having located thereon pens and other structures suitable for confining, watering, feeding and taking care of sheep. The sheep were in his sole and exclusive possession, and he, only, had the right to decide on the manner and method of feeding, watering and caring for the same, in the absence of instructions in that behalf by Davis. It is not pretended that Davis at any time attempted to suggest or instruct how or in what manner Sorrells should care for and feed the sheep. Sorrells was responsible for their safety and proper care while in his possession, and if he had been derelict in his duty in that behalf he would have been answerable in damages to Davis. Our attention is directed to the following clause in the con-

tract: "Party of the second part (Davis) agrees to feed 2000 head of sheep on the ranch." We construe this as simply an expressed obligation on Davis' part to deliver that amount of sheep on the ranch into the possession of Sorrells, to be fed and cared for by him, as a ranchman engaged in that business. It is manifestly plain from the subsequent action of the parties that it was not intended by those words that Davis should, personally or through his representatives, go upon the ranch, take possession of the pens and lands adjacent thereto, and thus assume exclusive possession thereof as against the owner of the ranch. No such effort was made by Davis, nor did he indicate any desire to so do. We are not in accord with the contention of defendant in error that the mere clause in the contract providing for a fixed compensation to be paid to Sorrells for feeding and taking care of the sheep changed Sorrells' *status* from that of a ranchman to that of an ordinary hired man. There is a well known canon of construction recognized in all jurisdictions, to the effect that where a contract is ambiguous, the construction placed upon it by the parties themselves is a good criterion to adopt in order to ascertain the intention of the parties from the language used. If that rule be adopted here, it appears from the testimony of both parties that neither Davis nor Sorrells considered the latter as a mere hired man, but rather as a sheep feeder and ranchman, having the sole custody and control of the sheep which were intrusted to his care for feeding, etc. On cross-examination of Davis he was asked:

"Q. You directed to him (Sorrells) how you wanted these sheep fed, did you not? * * *

A. I never gave him any directions, only took the sheep out there, but I understood that he was a sheep feeder, and a good one."

In *Tabor et al. v. Salisbury*, 3 Colo. App., 335, 33 Pac., 190, the court sustained and approved an instruction as properly expounding the law, in these words, viz.:

"The jury were properly instructed. They were clearly and plainly told by the court that if the stock was not entrusted to the ranchman to be fed, but remained in the custody of the owner or his employees, and the ranchman simply sold the feed which was consumed by the animals, and had no other custody of them than that which flowed from the permission to use his yards for feeding purposes, the case was not within the lien statute as against the mortgagees. On the other hand, the court told them that if they found from the testimony that the stock was entrusted to the ranchman, and that it was in reality in his custody for the purpose of care during the winter, that then his lien would attach."

The trial court in the instant case found and ruled that Sorrells was merely an employee of Davis under the contract, and as such had no right to an agistor's lien under the statute. We have already shown that we are not in accord with that court in such findings and rulings.

We will now consider the third question raised, viz.: Did Sorrells waive his right to enforce his agistor's lien?

Plaintiff contends that, as to the unpaid balance, if Sorrells had an agistor's lien for a balance due (after crediting the amount received from the sale of the wool) for feeding and caring for the lambs, he clearly waived the same as to the 306 head involved in this suit by permitting plaintiff to sell the same, after Sorrells had told Mr. Campion, on or about May 11th, that Davis owed him nothing for feed and care of the lambs in the past, and that he had settled with Davis for everything due at that time, those statements being made at the time Sorrells was soliciting Campion or his company to guarantee the payment of all future costs that might be incurred in the feeding and caring for the lambs. Defendant, on the other hand, insists that there was no agreement or understanding on Sorrells' part to waive his lien, and Sorrells denies he ever so waived it. We have carefully perused the record, and conclude that

there is sufficient evidence in the record to support a finding either that the lien was waived or that it was not waived, but it is manifest that the trial court did not decide this issue of waiver at the trial. The court having ruled that Sorrells had no right to an agistor's lien, it is evident that it did not consider the question of waiver of such lien. Upon retrial of the case this question of waiver may be submitted and determined.

Some other questions have been raised and discussed by counsel in the briefs, but, as the views of the court above expressed dispose of this appeal, we do not deem it necessary to make further reference thereto.

The former opinion will be withdrawn, the judgment reversed, and the cause remanded for new trial.

Judgment reversed.

Decided November 9, A. D. 1914. Rehearing denied May 10, A. D. 1915.

[No. 4154.]

CURRY V. EQUITABLE SURETY COMPANY.

1. RE-DELIVERY BOND—*Second Levy on Same Goods—Effect.* The levy of an attachment upon goods attached in a former action by the same plaintiff and for which a re-delivery bond has been given, has not the effect to discharge the surety in such bond. (188.)

To effect such discharge the goods must be sold by the sheriff, pursuant to the second attachment, or must, by the act or connivance of the plaintiff, be put beyond the reach of the surety or his principal.

A second levy by the sheriff in violation of the directions of the plaintiff has not the effect to discharge the surety in a redelivery bond given upon the first. *Schneider v. Wallingford,* 4 Col. Ap. 150, distinguished. (179, 184.)

2. PROCESS—*Plaintiff's Right to Control.* The plaintiff is entitled to control his process and direct upon what properties his attachment or writ of execution shall be levied. (186.)

If the sheriff violates his instructions the plaintiff is not liable for the consequences of his misconduct. (186.)

3. SURETY COMPANIES—*Contracts of—Construction.* The contracts of surety companies are construed like other contracts. The rule that the contract of a surety is *strictissimi juris* has no application. (187.)

Error to Denver District Court. HON. JAMES H. TELLER, Judge.

MESSRS. BARNETT & CAMPBELL, MR. JOSHUA GROZIER, for plaintiff in error.

MR. JULIAN G. DICKINSON, MESSRS. MCCALL & MCCALL, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

November 21, 1912, plaintiff Curry (plaintiff in error) instituted an action against defendants, The Equitable Surety Company and The F. A. Trinkle Automobile Company, upon a re-delivery bond previously executed by them in an attachment suit begun June 14, 1911, hereinafter more particularly referred to. The automobile company filed no pleadings in the case at bar. Judgment was rendered in favor of defendant, The Equitable Surety Company.

It appears without controversy that on June 14, 1911, said Curry began an action against the said automobile company and R. A. and Julia R. Trinkle, and sued out in aid thereof a writ of attachment which was levied upon certain personal property situated in the City of Denver; that on October 8, 1912, judgment was rendered in said action in favor of plaintiff for the sum of $2822.22, also sustaining the attachment; that on June 19, 1911, the automobile company as principal and The Equitable Surety Company as surety executed a re-delivery bond in accordance with the provisions of the code, whereupon the property attached was released by the sheriff; that subsequently, and on July 27, 1911, said Curry instituted another action against the automobile company, F. A. and Julia R. Trinkle

and J. A. Pierce, and also sued out in aid thereof a writ of attachment, under which a levy was made by the sheriff; and that on the following day the said Pierce, the automobile company and the surety company executed and delivered a re-delivery bond similar to the one hereinbefore mentioned, whereupon the property attached was again released by the sheriff. This latter action did not culminate in a judgment, the plaintiff being non-suited at the trial, and the attachment released. Other facts pertinent to the subject-matter, if necessary to be noticed, will be hereinafter mentioned.

The main question presented for determination by the court, and which is decisive of this appeal, is: Did the mere levy of the writ of attachment issued in the action begun July 27th, upon a portion of the same property previously attached (under the writ issued in the action of June 14th), and resumption of possession thereof by the sheriff, release the defendant surety company *in toto* or *pro tanto* from liability under the re-delivery bond which is the subject of this action? We think the record sufficiently shows that the able trial judge disregarded all other questions of law, and considered the issue as stated as controlling all others presented at the trial. If we properly interpret his findings and conclusions, he held as a matter of law that the sheriff, having under the writ of attachment in the action of July 27th re-seized a portion of the property previously attached by him under the former writ of June 14th (the plaintiff here having been plaintiff in both of said actions), thereby released the surety company from liability under the re-delivery bond which is the subject of controversy in the case at bar. He supports his position by citing a number of authorities, among which we find the case of *Schneider v. Wallingford,* 4 Colo. App., 150, 34 Pac., 1109. There is a marked distinction between some of the facts of that case and those of the case at bar. There the sureties upon the re-delivery bond were private indi-

viduals, not engaged in the surety business for profit, as in the case before us. No second re-delivery bond appears to have been executed in the subsequent actions in that case, nor re-delivery of the property to defendant, as was done in the case at bar. It does not appear from that opinion what disposition was made by the sheriff of the property attached in the subsequent actions, but it is shown that the defendant sureties in that suit attempted at the trial to adduce evidence tending to show that the identical goods surrendered to the attachment defendants on the execution of the delivery bond had subsequently come into the possession of the officer who levied the original writ. The trial court rejected the proofs so offered by defendants and gave a directed verdict for plaintiff. The court of appeals held such ruling to be reversible error, following and citing with approval the case of *Stevenson v. Palmer*, 14 Colo., 565, 24 Pac., 5, 20 Am. St., 295, which latter case held that the execution of a re-delivery bond and surrender of property thereunder did not destroy the lien of the attachment. In the Wallingford case it was said, in substance, that the lien could not be divested by a sale of the property by the attachment debtor, nor seizure and disposition of it by an officer under process; that the lien continued until judgment, and if the plaintiff's claim culminated in a judgment and execution for its enforcement, the property would still be treated as in the custody of the law, and subject to the original attachment lien; and, further, that if after surrender of the property to the defendant, under the re-delivery bond, the officer re-seized the goods under subsequent writ of attachment or execution, it thereby became subject to disposition under the prior attachment lien, which had been acquired by the levy thereunder, and the officer was charged with the duty of applying the proceeds of sale thereof to the satisfaction of such lien. The court further said:

"What the evidence might have shown concerning the disposition of this property, and whether the plaintiff would have been able to overcome the proof, which tended to show that possession of the goods had re-passed to the sheriff, to whom the creditor was bound to look for his money, cannot be determined from the present record. It is quite possible that the evidence on this subject may seriously affect the relations and rights of the judgment creditor, the officer and these sureties. According to the case as made, however, sufficient of these goods re-passed into the officer's possession to satisfy Wallingford's claim. Should the ultimate proof establish this fact to the satisfaction of the jury trying the case, and the evidence show that the goods were sold by the officer, or otherwise so disposed of that they were lost to the defendant and the judgment creditor, the legal effect must be to satisfy the debt and to compel the creditor to look to the officer alone for the satisfaction of his claim."

It is conceded in the instant case that under the second writ of attachment the sheriff re-seized sufficient property, formerly attached, to have paid the judgment obtained in the first case, although plaintiff contends that the attachment of the property under the writ of July 27th was against his consent, and in violation of his instructions. The point of difference between counsel, as to the force and effect of the Wallingford case, is clearly defined. Defendant contends that as the sheriff, under the writ of July 27th, re-seized sufficient property antecedently attached to pay the judgment, such levy *ipso facto* discharged the surety company from liability under the re-delivery bond we are now considering; while plaintiff insists with zeal that such re-seizure by the sheriff did not as a matter of law release the surety as claimed, but at the most established only a *prima facie* case for the surety company, and that such *prima facie* case could be overcome by plaintiff, through the introduction of proof showing that the sheriff did not sell

the property so re-seized, or otherwise dispose of it, so as to render it unavailable to the plaintiff creditor or defendant surety, or that plaintiff was not instrumental in any way in preventing the sheriff from satisfying the first attachment out of the proceeds arising from the sale under the second seizure. After a careful analysis of the Wallingford case, we are of the impression that it does not support in its entirety the contention of defendant, but rather tends to support that of plaintiff, as regards the point discussed. That part of the opinion quoted permits of a strong presumption that it was not the intention of the court to lay down the rule that a mere second levy upon property by a sheriff, antecedently levied upon by him in a former suit, *ipso facto* discharges the surety from liability under a redelivery bond given in the first suit, but, rather, that in order to have such effect, it must also be shown that the sheriff either sold the property under the second levy or otherwise so disposed of it that it was lost to the plaintiff creditor and defendant surety, or that the plaintiff was chargeable with acts which prevented the application of the proceeds to the liquidation of the judgment, *pro tanto*, or acts which deprived the surety of possession or control of the property after the second levy had been made. In each and every case cited by the trial judge in his findings and conclusions (which we will next consider) it was shown that the property was either *sold by the sheriff or disposed of by him in such a way as to become lost to the defendant surety or plaintiff creditor, or that plaintiff was directly responsible for depriving the surety of his legal rights in the premises*, viz.:

In *Caldwell et al. v. Gans et al.*, 1 Mont., 570, it appears that personal property was taken from the possession of the sureties, in a replevin bond, by the sheriff, under lawful process, and, without any fault on their part, sold by the sheriff, thereby making it impossible for them to re-deliver the property in accordance with their covenant in the bond.

In *Jaeger v. Stoelting,* 30 Ind., 341, plaintiff attached property which was subsequently recovered under a replevin bond. Two judgments were thereafter recovered against plaintiff in attachment actions at the suit of other creditors of plaintiff; executions issued, levies made thereunder, and the property sold by the sheriff, with the direction and consent of plaintiff, all of which rendered it impossible for the sheriff to re-deliver the property under his bond.

In *Hagan v. Lucas,* 35 U. S. (10 Pet.), 400, 9 L. Ed., 470, the controversy arose over an alleged right of a United States marshal to levy upon and take possession of property, under a writ issued from the United States Court, which property had been previously levied upon by a sheriff of the State of Alabama and delivered by him to one who had given a forthcoming bond to the sheriff under a statute of that state, to try the title to the property. The point under discussion here does not seem to have been directly involved in that case. The court said, in part:

"The principal question in this case is whether the slaves referred to were liable to be taken in execution by the marshal, under the circumstances of the case."

In *Dunlap v. Clements et al.,* 18 Ala., 778, the plaintiff Dunlap, after attaching certain property, and after the same had been replevined by the defendant Clements, sued out another attachment against one of the sureties in the replevin bond, and caused the same to be sold in the second attachment suit. In that case plaintiff by his own act prevented the surety from delivering the goods that were taken in the second attachment.

In *M'Rae v. M'Lean,* 3 Porter (Ala.), 138, the surety requested the sheriff to hold the property which he had taken under a second writ of attachment and apply the proceeds of its sale to the satisfaction of the first attachment, but instead of doing so the sheriff delivered the property to a stranger, who removed it from the state. It will be observed that the surety, instead of having the property

re-delivered to his principal (as in the case at bar), protested against the sheriff delivering it to anyone, but insisted upon his right to have the sheriff retain and sell the property to satisfy the first attachment.

In *Scarborough v. Malone et al.*, 67 Ala., 570, the action was brought against a sheriff upon his official bond, without including the sureties. The breach of the bond, as alleged, consisted in the sheriff levying upon property with knowledge that it had been previously levied upon by his predecessor in office, and that he turned the property over to the plaintiffs in the attachment suit, who removed the same beyond the limits of the state. The gist of the decision was that the sheriff, without fault of plaintiffs, was guilty of misfeasance in delivering the goods levied upon to the plaintiffs in the second attachment, who sent it beyond the limits of the state, so it could not be reached and subjected to the prior lien under the first attachment; and, further, by inference at least the opinion recognizes that an attachment upon goods previously attached, when subject to and subordinate to the lien of the prior attachment, is permissible.

Young v. Walker, 12 N. H., 502, was an action in trover for a horse. It was said by the court:

"The plaintiff has seized and sold the horse, so that the defendant could not deliver him, and now brings his suit because the defendant has not done that which the plaintiff has rendered it impossible for him to do, and which he might have done had it not been for the act of the plaintiff."

In *Rood v. Scott et al.*, 5 Vt., 263, the plaintiff (deputy sheriff) brought the action against his bailees for not returning to him upon demand a yoke of oxen which had previously been put in possession of the bailees, and receipt taken therefor. The defense was that plaintiff had taken the oxen from defendants, thus preventing them from delivering the same according to their receipt. Plaintiff admits that to be true, but pleads that he so took the oxen

under a writ of attachment. The syllabus reads, in part, as follows:

"If an officer take into his custody personal property by writ of attachment, and a third person receipts the property, and suffers it to go back into the hands of the debtor, the officer by taking the receipt does not part with his lien upon the property. But if the officer takes the same property into his custody by virtue of a second writ of attachment and *keeps it from the receipter*, this will discharge the receipt." (Italics ours.)

As said before, the cases to which we have just referred were all cited by the trial judge in his findings and conclusions. They each and all involve facts distinguishable from those of the Wallingford case and the one at bar, in this, to wit:

1. In all those cases, including the *Wallingford* case, the sureties involved were private individuals, and presumably executed the bonds or undertakings as accommodation to their principals, and received no compensation or profit therefor; while in the instant case the surety is a corporation, organized for the sole purpose of making profit by and through its execution of this and similar bonds.

2. In all such cases, excluding the *Wallingford* case, the sheriff or other officer who re-seized or re-possessed the property in subsequent suits or proceedings, after it had formerly been taken into custody under lawful writ or process, either sold the property or delivered it to the plaintiff or third parties, who, by removing it from the state, or by other acts, prevented the surety from being able to re-deliver it under his bond obligation; while in the instant case the property was not sold by the sheriff, but was, within twenty-four hours after the second levy, released from the sheriff's custody by the execution and delivery of a second re-delivery bond. The surety in the re-delivery bond which is the subject of this action was the same surety in the second re-delivery bond.

3. In those actions, the property levied upon the second time in no instance came again into the posession or under the control or dominion of either the plaintiff creditor, or defendant surety, which fact rendered it impossible for the surety to redeliver the property under the requirement of his bond; while in the instant case the surety within a short period after the second levy executed the second redelivery bond, and the property was released to him and his principal, who, at the time the judgment was rendered against the principal, and at all times thereafter, were able to deliver the property up to the sheriff under the terms of their original delivery bond, and cause the same to be sold by him and the proceeds applied to the satisfaction of the judgment rendered in the action of June 14th.

If the *Wallingford* case be read and interpreted in the light of the facts therein appearing, we think the ruling therein announced should be confined, as authority, to such facts only, and not extended to include a state of facts similar to those disclosed by the record in the instant case. Undoubtedly the *Wallingford* case holds that if, after levy by the sheriff under a subsequent writ, he holds and retains possession of any part of the property previously attached or levied upon under a former writ, for the purpose of satisfying the lien created by the first levy, the surety will be released *pro tanto*, to the extent of the value of such property; and further, that the sheriff cannot hold the property under such circumstances, and at the same time call upon the surety to redeliver the same, or, in default thereof, pay its value. It is *stare decisis* in this state that when property has been lawfully levied upon under proper process, and taken into possession by a sheriff, the lien thereby created is not affected by any subsequent levy or surrender of possession under a redelivery bond, but, whatever becomes of the property after such levy, it is subject at all times to the lien created by the first levy, and can be followed, pursued and retaken, after judgment in the original case, for the pur-

pose of being sold, and the proceeds applied to the satisfaction thereof. *Stevenson v. Palmer, supra; Chittenden v. Nichols,* 31 Colo., 202, 72 Pac., 53. Counsel for defendant, however, urge with ability and force that plaintiff in this case, by his own voluntary act, in commencing the second attachment suit, and causing the writ to be levied upon the same property antecedently attached, thereby made it impossible for the surety company to deliver the property to the sheriff under the requirements of the redelivery bond. Whether or not, as a matter of law, this act of the plaintiff released the defendant surety, depends upon the legal effect to be given to a second levy upon personal property which is already in the custody of the law under lawful levy in a prior action. While there is some conflict in the courts, the general trend of authority permits property already in the custody of the law, under former suits, to be levied upon in subsequent actions. While there is no statute in this state directly authorizing, in terms, subsequent writs to be levied upon property already in custody of the law under legal process, chapter VI, Mills' Annotated Code, page 275, seems to recognize the right of any creditor, within thirty days after a writ of attachment has been levied upon property and possession taken by the sheriff, to begin an action against the defendant in the original suit, and file a lien in his favor upon the property so originally attached, thus permitting him to pro-rate with the original plaintiff in the property attached. We do not think, however, it is necessary to decide the point, for the reason that the record shows that at the trial plaintiff made vigorous effort to introduce proof showing that when he began the second attachment suit, on July 27th, he had no intention of attaching thereunder any property which had been already attached in the action of June 14th, and offered in evidence a letter and written instructions directed to the sheriff before the levy was made, specifically telling him to not levy upon any property previously attached, and informing him that it was not

the intention of plaintiff to make any levy upon such property, but that it was his sole intention to have the writ levied exclusively upon property which had come into the possession of the defendant subsequent to the time of the levy of June 14th. The introduction of this proof was objected to by defendant surety, and the objection sustained, to which exception was saved. We believe this ruling of the trial court was error which was prejudicial to the rights of plaintiff, and that the evidence was proper to be considered by the jury. Had the letter and instructions been admitted, instead of rejected, and had they not been disproved by defendant, the jury would have been warranted in finding, as a matter of fact, that the plaintiff did not intend at any time to have any of the property attached, in that action, which had been levied upon in the action of June 14th, and that as to such property the sheriff acted in violation of the direct instructions of the plaintiff in that regard; hence the contention made by defendant that plaintiff of his own volition caused the property attached under the writ of June 14th to be again taken into custody of the law, under the writ of July 27th, could not be maintained. It cannot well be denied that a creditor, after judgment or after suing out a writ of attachment, has the right to have the execution or writ of attachment levied upon such property as he may specifically designate, and no other, notwithstanding (as in the present case), the writ instructs the officer to seize and take into his possession *all* the property of defendant which he may find in his jurisdiction.

Should it be said that sureties are specially favored by the law, which was undoubtedly the case in former times, and before the incorporation of companies for the sole purpose of executing bonds of this character for profit, still, since the formation of such corporations has come into general practice, the modern decisions seem to depart from the former rule in that regard, and are inclined to hold to a stricter interpretation of surety contracts similar to the

present one; and it seems to be the favorite interpretation of such contracts in the present day, by the courts, to hold that such corporations for profit are in effect insurers, and such contracts are construed most strongly in favor of the obligee. In *Empire S. S. Co. v. Lindenmeier*, 54 Colo., 497, 131 Pac., 437, Ann. Cas., 1914, C. 1189, the court said in part:

"The defendant is a surety company engaged in the business of furnishing surety bonds, and must be considered in the light of the rule of construction as to strictness in such case, differing from that of individual sureties.

'Generally speaking, a contract of surety by a surety company is governed by the same rules as the contracts of other sureties, but some distinctions are made by the courts in construing such contracts. The doctrine that a surety is a favorite of the law, and that a claim against him is *strictissimi juris*, does not apply where the bond or undertaking is executed upon a consideration, by a corporation organized to make such bonds or undertakings for profit. While such corporations may call themselves "surety companies," their business is in all essential particulars that of insurers. Their contracts are usually in the terms prescribed by themselves, and should be construed most strongly in favor of the obligee.'—32 Cyc. 306."

See also *Bross v. McNicholas et al.*, 66 Ore., 42, 133 Pac., 782.

There is another rule of law which seems to be pretty well established at the present day, and that is that sureties for profit, when sued upon bonds or undertakings such as we are now considering, must, in order to establish a defense, be able to show that they have been injured or deprived of some legal right, by or through the action of the sheriff or plaintiff creditor. In *Bross v. McNicholas et al.*, *supra*, it is said:

"In this day and age of corporate sureties, when the burden is lightened by the payment of adequate premiums,

and their final liabilities ofttimes secured by counter indemnity, the strictness of the old rule is relaxed, and the modern day surety company must show some injury done before they can be absolved from the contracts which they clamor to execute."

It is said in *U. S. F. & G. Co. v. Cochrane,* (Wash.), 142 Pac., 687, L. R. A., 1915A, 853.

"The appellant was a compensated corporate surety. It cannot invoke the old rule of *strictissimi juri.*"

See also *U. S. F. & G. Co. v. Pressed Brick Co.*, 191 U. 416, 48 L. Ed., 242, 24 Sup. Ct., 142, and *School District v. M. B. & I. Co.*, 92 Kans., 53, 142 Pac., 1077.

Applying this rule to the facts in this case, we fail to see wherein the defendant surety company has been in any way injured, or suffered the loss of any legal right to which it was entitled, by reason of any act of the sheriff in handling the property attached, or by reason of any act done by the plaintiff creditor, with respect thereto. The most important right of a surety company in executing a redelivery bond, such as we are now considering, is, through its principal or itself, to retain dominion and control over the property released, to the end that if judgment be recovered in the main action the property may be delivered to the sheriff, to be by him sold and the proceeds applied in satisfaction of the judgment. In the instant case the defendant surety and its principal joined in executing the redelivery bond, and thereby secured the physical possession of the property attached under the writ of July 27th, and at all times thereafter the property remained within their possession and control. The record shows, however, that the property so attached, or a great part thereof, instead of being preserved and kept intact by the sureties and principal, for the purpose aforesaid, was sold in the usual course of business, by the principal. It is therefore manifest that the surety company and principal were entirely responsible for their inability to turn the property over to the sheriff upon demand

after judgment had been obtained in the original case.

From what has heretofore been said it is evident that we must hold that the mere levy in the subsequent action of July 27th, upon the property antecedently attached in the action of June 14th, without any further showing, did not discharge the surety from liability under the redilevery bond given in the first action; that, in order to have such effect, it must be further shown that the property so reseized was sold by the sheriff or otherwise disposed of by him in such a way as to remove it from the possession or control of the defendant surety or his principal, or it must be shown that the plaintiff creditor was guilty of some act which deprived the defendant surety or its principal of the possession and control thereof.

There are a number of other interesting questions raised in the briefs and ably discussed by the respective counsel, but we are convinced that, however they might be determined, it would not result in affirming the judgment or changing the conclusions already reached upon the main issue heretofore decided.

The judgment is reversed and the cause remanded for new trial.

CUNNINGHAM, P. J., not participating.

Reversed and remanded.

[No. 4172.]

WOOD V. YANT ET AL.

1. EVIDENCE—*Judicial Notice* taken that where land and water are united in use, the value of the land is often spoken of, and intended to be understood, as including the value of both. (194.)

2. REPRESENTATION TO OBTAIN CREDIT—*Construed.* Husband and wife, to obtain credit at a bank, made and delivered what was therein described as "A true and correct statement of all their assets and liabilities." Among

other items was set down a farm of 160 acres in Otero County, valued at $12,000. Certain shares in the stock of an irrigating company were standing in the name of the wife, and by means of this holding water was obtained for the irrigation of the land. The shares were not expressly mentioned in the statement. The lands without water were of little value. On the face of this statement the bank advanced money to the two, on the individual note of the husband, and the money was checked out by both husband and wife at pleasure. *Held*, that the shares in the irrigating company were intended to be included in the statement, and were liable to the execution of the bank, issued upon a judgment recovered against the husband alone for the loan. (191-195.)

3. HUSBAND AND WIFE—*Wife's Separate Property* is subject to the husband's debts where, with her knowledge and consent, he is permitted to deal with it as his own, and thereby obtain credit. (197.)

4. EXECUTION SALE—*What Is Acquired by the Purchaser.* Where the circumstances are such that a judgment creditor is entitled to subject particular chattels to execution for the satisfaction of his judgment, any purchaser at the execution sale succeeds to this right. (195.)

5. CORPORATION—*Execution Sale of Shares—Effect.* It seems that one who purchases the shares of a stockholder at a valid execution sale thereof, may, by application to a court of equity, the stockholder being impleaded, require the corporation to transfer the shares to him, upon its books, though the former stockholder retains the original certificate.

Error to Otero District Court. HON. J. E. RIZER, Judge.

Mr. A. B. WALLIS and Messrs. THOMAS & THOMAS, for plaintiff in error.

Mr. GEORGE A. KILGORE and Mr. FRED A. SABIN, for defendants in error.

BELL, J.

Early in 1911, plaintiff in error, with her husband, Will. S. Wood, and daughter, Armelda, resided on a ranch near Fowler, Colo. Both she and her husband carried separate accounts with the Fowler State Bank, and borrowed money from said bank on their joint and individual notes. Checks were drawn against both of the accounts by each of the parties, and some were drawn against the account of Minnie P. Wood by her daughter, Armelda, all

of which checks were paid, without objection from either Minnie P. or Will. S. Wood, in the usual course of business. On or about May 26th, 1912, Will. S. Wood was indebted to said bank in the neighborhood of some $750, and applied for a further loan of from $2000 to $2500. Before making said loan, the bank asked for and obtained a property or financial statement, signed by Will. S. and Minnie P. Wood, in words and figures as follows:

"To Fowler State Bank, Fowler, Colo.:

"For the purpose of establishing credit from time to time with you for money borrowed or otherwise, the undersigned furnish the following statement as being a true and correct statement of all their assets and liabilities on the 26th day of May, 1912. Upon the faith of such statement you can rely in loaning money to them.

"ASSETS.

"Real Estate (Give detailed description, location and value): 252 acre farm in Fayette and Highland County, Ohio, for which we refused a cash offer of $32,000.00; 160 acre farm in Otero County, Colo., valued at $12,000.00; 16 houses in Cripple Creek, probably worth $10,000.00.

"Live Stock (Give number, age, sex, value and location): About 50 mares and colts, value about $2,000.00; other live stock, cows, calves and hogs, about $500.00.

"Personal Property: 12 houses, furnished, value $500.00.

"Total assets, $54,000.00.

"LIABILITIES.

"Encumbrance on Real Estate, $9,000.00.

"To whom, when due and rate of interest? Northwetsern Mut. Life Ins. Co.; due in 1916; interest 6½ per cent.

"Encumbrance on Live Stock? None.

"To whom, when due and rate of interest.....?

"Other borrowed money, Fowler State Bank, about $750.00.

"To whom and when due.....?

"Other liabilities: Undue accounts, $200.00; unpaid taxes, about $500.00.

"Total liabilities, $9,950.00.

"Are you endorser or surety on any note or other obligation? No.

"If so, indicate amounts and for whom. .....

"Do you hold good title in and to the above described real estate, and is it in your name? Yes.

"If not, in whom is the title vested? .....

(Signed) "Will S. Wood,
"Minnie P. Wood.

"Date signed, May 26, 1912."

Upon the strength of this statement the bank made loans from time to time, amounting to the sum of $2,100, which were secured by the individual notes of Will S. Wood, entered to the credit of Minnie P. or Will S. Wood, and checked against by both Will S. and Minnie P. Wood, and also by their daughter, signing "Minnie P. Wood by Armelda Wood." All of these checks were also paid and cancelled in the usual course of business, the pass book of the account balanced and returned with the cancelled checks, according to the testimony of the president of the bank, to the owner. When the notes securing said loans became due, the president of the bank was in possession of information to the effect that the property mentioned in the statement was in the name of Minnie P. Wood, and that apparently Will S. Wood had no right or title thereto. He therefore insisted that Minnie P. Wood should join in a note to renew the loans, and upon her refusal to do so the bank caused judgment to be entered upon the notes of Will S. Wood, had execution issued thereon, by virtue of which defendant in error, as Sheriff of Otero County, levied upon certain property, including certain lands containing about 160 acres in Otero County, and standing upon the records of said county in the name of Minnie P. Wood, and also 5 shares

of stock of The Rocky Ford Canal, Reservoir, Land, Loan and Trust Company, the water secured by which was applied to the irrigation of the land above mentioned, which shares of stock were entered upon the books of the company in the name of Minnie P. Wood, evidenced by certificate of stock No. 2052 held by her, and offered for sale by said sheriff under said execution. After levy and before sale plaintiff in error filed her complaint in the instant case, alleging that she was the sole owner of the land and stock levied upon, and praying for a temporary and permanent injunction restraining said sheriff from selling or conveying said stock so levied upon and offered for sale by him. The temporary injunction was denied, and said stock was sold to Martin Eder for the sum of $2,850, which was applied to the payment of the judgment against said Will S. Wood and the attendant interest, costs and expenses, leaving a balance of $143.48, which was tendered to, and refused by, Will S. Wood, the defendant in the execution. Upon the issue to him of the certificate of purchase of said stock, said Martin Eder presented the same to said The Rocky Ford Canal, Reservoir, Land and Loan Company, and demanded that said stock be transferred to him on the books of the company. This the company refused to do, for the reason that said stock stood in the name of Minnie P. Wood, who retained the certificate for same, and he thereupon filed his petition in intervention to the complaint of the plaintiff in error, wherein he sets up the transactions of said Minnie P. and Will S. Wood with The Fowler State Bank, and alleges that she, the said Minnie P. Wood, by reason of the representations made by her in the property or financial statement hereinbefore quoted, is estopped from asserting any title to the shares of stock in controversy. The trial court found the issues in favor of the intervenor, Martin Eder, and denied any right of Minnie P. Wood to said stock, as against his claim under his certificate of purchase.

Plaintiff in error insists that said stock was not specifically listed in the property or financial statement, and was not included therein. It is true the stock is not specifically mentioned in the statement, but whether it is really included, and intended so to be, was a proper question of fact submitted to the trial court. The statement reads: "A true and correct statement of *all* their assets," and specifically mentions a 160-acre farm, to the irrigation of which the water secured by said stock was shown to have been applied. This farm is valued, in the statement, at $12,000, and it is a matter of common knowledge that where land and water are united in use, as they were in this case, the value of the land is often spoken of and intended to be understood as including the value of both. The statement also specifically sets forth that their *total* assets were of the value of $54,000, and particularizes their real estate holdings, their live stock and their personal property; and in view of such representations it is not at all probable that so important an item as the water stock should have been forgotten, as it was to their advantage to make as favorable a showing of their financial worth and responsibility as their means would permit, since the greater the showing, the greater and easier would be their extension of credit. There is no plausible reason shown in the abstract why this item should have been intentionally omitted from the financial statement, nor is it probable that it could have been so omitted without an endeavor on the part of the plaintiff in error and her husband to deceive the bank by falsifying their written statement, which purported to list *all* of their property, and upon the faith of which they intended it should rely. But even more direct and positive is the inference that the stock was intended to be included in the statement, acording to the testimony of Mr. R. B. Spruill, president of The Fowler State Bank. He testified, although contradicted, that when the statement was returned to him by Will S. Wood, he inquired of him as to

how much water he had with the farm, and was informed that he had six and one-half shares of Highline water. Further, plaintiff in error alleges, under oath, in her complaint that "said lands and premises the farm) would be of little value but for the water as aforesaid, which is applied to the land," and while the farm was valued at $12,000, it was shown that the stock in controversy, which secured the water so referred to by her, was sold at the sheriff's public sale for only $2,850.

These and other facts and circumstances were before the trial court in passing upon the question, and having met the witnesses face to face, it found on such evidence that "the said five shares of corporate stock were included and were intended to be included by the plaintiff in said credit statement in which the plaintiff represented that the property therein described included all of the property of the plaintiff and her said husband."

We think that this finding of the trial court has abundant evidence to support it, and therefore that it should not be disturbed.

Error is assigned, but not argued, to the admission and exclusion of certain testimony, but after a very careful examination of the record we are satisfied that the plaintiff in error was not, and could not be, prejudiced by the rulings of the trial court in these particulars

The only other question insistently pressed in argument by plaintiff's counsel is that there is not such a privity of interest existing between the judgment creditor, The Fowler State Bank, and the intervenor, Martin Eder, who purchased the water stock at the execution sale, as to entitle him to the relief he prays, even though an equitable estoppel might have been invoked by the judgment creditor, If the judgment creditor had the right to sell said stock for the satisfaction of its judgment, then any purchaser at the execution sale would have secured the same right, as a purchaser, that the judgment creditor, through the sheriff, had

to sell, as no principle of law or equity limits the right to purchase a good title to the judgment creditor alone.

The trial court found that the plaintiff, at the very threshold of this controversy, did not come into court with clean hands. The financial statement, signed by Will S. and Minnie P. Wood, and presented by them to The Fowler State Bank, showed that they together owned property of the value of $43,550 in excess of all their indebtedness. With such a showing the president and manager of the bank had every reason to believe that either or both of them had an abundance of unincumbered property sufficient to insure the satisfaction of all credits extended to Will S. Wood.

Counsel for plaintiff, in his written argument, states that

"There is no ambiguity about that property statement. On its face it purports to be given to establish joint credit at the bank. This was the purpose of Minnie P. Wood in signing the statement."

It is not so important to determine the undisclosed intention of Minnie P. Wood as it is to determine what probable effect her representations had on the mind of the president and manager of The Fowler State Bank, acting as a person of reasonable precaution, in extending the credits in controversy to Will S. Wood. The statement she signed and filed with the bank reads:

"For the purpose of establishing credit from time to time with you for money borrowed or otherwise, the undersigned (Will S. and Minnie P. Wood) furnish the following statement as being a true and correct statement of all their assets and liabilities on the 26th day of May, 1912. Upon the faith of such statement you can rely in loaning money to them."

After the money was advanced on the strength of such statement, it was placed to the joint credit of Will S. and Minnie P. Wood, and checked out by both of them at pleasure; but when the day of re-payment arrived, they came

into a court of equity and solemnly swore, notwithstanding their written statement to the contrary, that Will S. Wood had not then and never had any interest in the property that they represented, in their said signed statement to the bank, as the common property of both for the purpose of obtaining credit, and upon the strength of which Will S. Wood obtained the very money and credits in controversy herein.

It is a well established general rule, applicable alike in law and equity, that parties shall not be entitled to establish a claim, *or to enforce a defence,* by reason of acts or misrepresentations which proceeded from themselves, or were adopted or acquiesced in by them after full knowledge of their nature and quality; and, further, that where misrepresentations have been made by one of two litigating parties, in his dealings with the other, a court of law will either decline to interfere or will so adjust the equities between them as to prevent an undue benefit from accruing to that party who is unfairly endeavoring to take advantage of his own wrong. Broom's Legal Maxims, 7th Ed., 238.

A clear import of the financial statement is that the property listed therein was the common property of Will S. and Minnie P. Wood, who signed the same, and was a holding out of said property by Minnie P. Wood at the time the statement was signed, as the property, in part at least, of Will S. Wood, which she now says was her sole property. Such a holding out of property may make the same liable for advances secured thereon on the faith of such representations, to the extent that others were misled to their injury thereby while extending credit in good faith on the strengh thereof. *Prewitt v. Lambert,* 19 Colo., 7-12, 34 Pac., 684.

A wife's separate property may become subject to the debts of her husband in case he be permitted to deal with it and obtain credit upon it as his own, and with her knowledge and consent. *De Votie et al. v. McGerr,* 15 Colo., 467, 24 Pac., 923, 22 Am. St., 426. And while this court feels

that other approved methods of procedure might have been adopted in this case, more appropriate to reach the relief sought than that followed herein, nevertheless, we are not able to say, from a review of the whole record, that the trial court was not authorized to decree that The Fowler Sate Bank was entitled to subject enough of the property mentioned in the financial statement, including the shares of water stock in controversy, to execution sale to re-pay the moneys and satisfy the credits obtained on the strength of said statement, and that the complaints and defenses made by the plaintiff, Minnie P. Wood, were without equity; hence, the decree of the trial court in the premises ought to be, and is, hereby affirmed.

Affirmed.

[No. 3980.]

CULKIN V. MATZ.

1. PAYMENT—*Debtor May Direct Application.* A debtor paying money to his creditor is entitled to direct its application; and the creditor is bound to give credit accordingly. (203.)

And it is not necessary that the debtor should expressly state his purpose as to the application of the payment; if from the circumstances it may be clearly implied, the creditor is bound to respect it. (203.)

The creditor asserting several demands, one of which is admitted and the others denied, it will be presumed, in the absence of evidence to the contrary, that any payment made was intended by the debtor to be applied upon the demand admitted. (204.)

2. STATUTE OF LIMITATIONS—*The evidence Examined,* and *held* that the plaintiff's demands were barred by the statute. (204.)

3. APPEALS AND ERROR—*An Insufficient Reason for a Correct Judgment* is not error. (204.)

Error to the Denver District Court. HON. CARLTON M. BLISS, Judge.

Mr. CHARLES S. THOMAS, Mr. JOHN J. WHITE, Mr. EDWARD P. COSTIGAN and Mr. A. S. FROST, for plaintiff in error.

Mr. DAN B. CAREY, for defendant in error.

BELL, J.

The plaintiff in error herein, father Culkin, a Catholic priest, while in charge of the Canon City parish and church property in the year 1888, was suspended and had his faculties as a priest taken from him by bishop Machebeuf; nevertheless, he, said priest, did not deliver possession of the church property to said bishop on demand, and suit therefor was instituted in the Fremont County District Court at Canon City, Colorado. In February, 1890, bishop Matz, successor to bishop Machebeuf, and Henry Egler, a Catholic priest, plaintiffs in said suit, signed a stipulation, stating that the controversy over the church property had been amicably adjusted, and the cause dismissed at their costs, and that, in consideration thereof, father Culkin agreed to deliver to the bishop the church property held by him and release the sureties on the bond filed in the action. This stipulation was taken by father Egler to father Culkin at Canon City for his approval and signature, and father Culkin added qualifying provisions to the same, preceding his signature, as follows:

"This stipulation is subject to the terms of an agreement made this day between the parties and signed on the part of bishop Matz by T. H. Malone, February 14, 1890."

The agreement referred to in the clause above quoted is signed as stated therein, and is to the effect that, as a part of the settlement of the suit between the parties, and partly in consideration thereof, father Culkin would accept and receive the position of priest of the Sterling parish, and should be guaranteed a salary of $600 per year, and the

perquisites usually going with such a position; that he would be allowed to present his accounts for payments of money claimed to have been personally made by him in and about said church property, and be compensated therefor in the manner usual in cases of moneys so advanced by parish priests; that he should have the right to have his claim for past salary adjudicated by the church authorities; and that he should be allowed $150 for counsel fees in said suit. On this agreement, and the modified stipulation, father Culkin instituted the present action in the District Court of the City and County of Denver in April, 1909, more than 19 years after their execution, to recover from the bishop the sum of $17,000, with interest thereon at the rate of 8 per cent. per annum from the 5th day of March, 1907, as a balance claimed to be due him thereunder, and the case was tried to a jury and resulted in a directed verdict in favor of the defendant and judgment against the plaintiff for costs.

The agreement and modified stipulation were never filed in the Fremont County District Court or acted upon by the parties, and it seems that they were not seen by the bishop until some days after their execution. He contends herein that father Malone was authorized only to tender to father Culkin the Sterling Parish; that all other propositions contained in the agreement were made subject to his approval; that the papers were forwarded to him in Denver for this purpose; and that he never ratified them or any part of them. Father Culkin testified at the trial of the instant case that, soon after he signed the instruments, he called upon the bishop at Denver, and that the bishop said to him:

"This is the contract that I authorized father Malone to make; I will pay you that contract, on condition that you give me an account of the money you received questing."

To this he testified he replied that he, the bishop, was defeated in Rome and in the civil courts; that what he, the

bishop, demanded was not in the contract; and that the moneys given him by his friends for his personal use the bishop was not entitled to. He informed the bishop that he had no means whatever to pay his expenses to Sterling, and insisted that the bishop should advance or lend him money enough to make the trip. The bishop declined to do this.

The bishop held the stipulation which authorized him to dismiss the action in the Fremont County District Court at his own cost, and re-possess the church with its property; but he ignored the same and proceeded with the trial in the usual way. The record shows that father Culkin also appeared at the trial and defended in the usual way, and that a judgment and a decree were therein rendered against him, imposing upon him the costs and perpetually enjoining him from in any manner interfering or meddling with the posesssion of the church property. If he desired to use the stipulation and agreement in the civil courts, he had the legal right to set them up in a supplemental answer, and show that, by an existing legal contract, he was exonerated from being mulcted with any of the costs of the proceedings. He says, however, that he appeared only to see that nothing was done to militate against his rights under the stipulation and agreement. This may be true. The court records, however, show that he participated in the trial and therein ignored his stipulations, and that he excepted to the entering of the decree and was granted 90 days within which to tender a bill of exceptions.

Soon after the completion of the trial in the Fremont County District Court, he took the modified stipulation and agreement to Rome and presented them to the ecclesiastical authorities there, and remained there for a period of 14 years in an endeavor to have his claim allowed by the ecclesiastical court, which finally rendered a decision in words and figures as follows:

"S. Congregation De Propaganda Fide.

Rome, May 15th, 1895.

"Protocol No. 12923.

"Most Illustrious and Reverend Lord:

"I inform your Lordship that in the General Meeting held on the 22nd day of last April the Most Eminent Fathers considered the question between the Denver Curia and the priest Culkin, and gave the following decisions, which were confirmed by His Holiness in an audience on the 11th day of the present month of May, namely:

"(a) That the legality of the contract between the priest Culkin and the Rev. Malone has not been proven, nor is it to be enforced (or put into execution).

"(b) That there is no ground for the damages which the priest Culkin asks of the Bishop of Denver.

"(c) That the aforesaid priest Culkin has no right to be reinstated in the parish of Canon City.

"(d) The Bishop of Denver is requested to pay the priest Culkin an annuity of $200.00, which he himself offered; on these conditions, however, that the said priest first submit to the bishop and seek another diocese far removed from the Diocese of Denver. In the meantime, let him know that he has relapsed under the censures from which he has been absolved during the trial. By these decisions the questions must be considered as finally determined, and the Most Eminent Fathers appended the clause 'ne amplius,' which means that 'the cause will not be heard again.'

"M. Card. Ledochowski, Prefect."

In 1900, father Culkin wrote the bishop an apology, to-wit: "If during this controversy I have offended you, I am sorry." The bishop construed this as a submission under the decision of the ecclesiastical court, and on September 19th, 1900, he wrote father Culkin, among many other things, as follows:

"Now, then, since you profess full submission to the Holy See, I herewith relieve you from all censures, so you

may be allowed to say mass. Bear in mind, however, that should you ever return to Denver, or any part of this diocese, you will *ipso facto* fall again under censure and be deprived of your annuity.

" * * * I will say that as soon as you will inform me where you have settled down to stay, I will send you one hundred dollars, one-half of your annuity in advance for six months; and thereafter regularly every six months the same amount."

For the subsequent 7 years, these remittances as promised in the bishop's letter were forwarded to father Culkin and retained by him, who at times sent receipts to the effect that he accepted the payments on the agreement herein sued upon; and by reason of such receipts, he now contends, for the purpose of avoiding the statute of limitations, that these payments must be construed as having been made upon the agreement.

The circumstances attending these payments, in addition to the statements contained in the bishop's letter, make it unmistakable that every payment was intended to be made on the annuity as suggested by the ecclesiastical court, and it is immaterial as to what father Culkin may afterward have said in letter, or receipt, or by word of mouth, if he retained the payments that the bishop applied and intended to be applied upon the annuity. The general rule is that a debtor paying money to his creditor has the right to direct how the money shall be applied; that is if he be indebted on separate and distinct accounts, he may have the money applied on such account or accounts as he shall direct, and the creditor receiving the money with such directcions is bound to give credit accordingly. If the debtor pays money to his creditor without directions as to its application, the creditor may apply the same to any debt due him at the time from such debtor. It is not, however, always necessary that the debtor should expressly state his purpose as to the application of the payment; if from the circumstances of

the case, his purpose may be clearly implied, the creditor is bound to regard it. Thus where the creditor owes him on two separate demands, one of which is admitted and the other disputed, if the debtor under such circumstances makes a payment to his creditor, it will be presumed, in the absence of evidence to the contrary, that the payment is made upon the demand admitted rather than upon the one in dispute at the time of making such payment: *Perot v. Cooper*, 17 Colo. 80, 86, 28 Pac. 391, 31 Am. St. 258, and cases cited.

We think that the claim of the plaintiff in error clearly comes within the statute of limitations, and is, therefore, barred, and that defendant's motion for a directed verdict at the close of the evidence was properly granted. It is immaterial whether the cause assigned by the trial court for directing the verdict is sufficient in itself, as the result was the proper one, and the judgment is, therefore, affirmed.

Affirmed.

Decided February 8th, A. D. 1915. Rehearing denied June 15th, A. D. 1915.

[No. 4082.]

HEBERT *v.* PATRICK ET AL.

1. EVIDENCE—*Shifting Burden of Proof.* When the owner of an animal bailed to an agister shows the bailment, demand, and failure to return, he establishes a *prima facie* case against the agister. (205.)

If the latter, under proper pleadings, shows the escape of the animal in a manner which dispels every inference of negligence on his part, the burden shifts to the plaintiff to establish negligence. (206.)

2. AGISTER—*Liability.* An agister is not an insurer of the safe return of the animal bailed to him. He is liable only for want of ordinary care. (206.)

3. APPEALS AND ERROR—*Verdict Upon Conflicting Evidence* will not be disturbed. (206.)

4. —— *What May Be Assigned for Error.* Trial by a special jury instead of the regular panel will not avail on appeal, where no objection thereto appears in the record. (207.)

5. PLEADINGS—*Agreement Supplying Absence Of.* Complaint against two. A third defendant was atferwards joined and summoned, but no complaint was filed as against him, nor any answer from him demanded. The cause was set for trial by agreement. Application for a default as to the third defendant two or three days after the trial was properly denied upon the ground that apparently any pleading on his part had been waived by agreement. (206.)

Error to Adams District Court. HON. H. S. CLASS, Judge.

Mr. DUNCAN MCPHAIL, for plaintiff in error.

Messrs. JOHN A. RUSH, and LEWIS C. RUSH, for defendants in error.

MORGAN, J.

In the lower court the plaintiff in error sued the defendants in error for the value of a horse entrusted by the plaintiff to the defendants to pasture, as agisters, at an agreed sum per month. The horse escaped or was stolen, and on demand the defendants were unable to restore it to the plaintiff. Trial to a jury and verdict for defendants.

First, the plaintiff contends that the court erred in instructing the jury that the burden of proof was upon the plaintiff to prove that defendants did not use ordinary care in keeping the horse, and in refusing to give an instruction that the burden was upon the defendants in this respect. Under the law of agistment, or bailment, the owner of the animal agisted, in a suit for its value, after demand and failure to return, may be said to make out a *prima facie* case when he has alleged and proved the agistment, the demand and failure to return. 3 R. C. L., Sec. 74, p. 151, citing *Prince v. Alabama State Fair,* 106 Ala., 340, 17 So., 449, 28 L. R. A., 716; *Marlatt v. Levee Steam Cotton Press Co.,* 10 La., 583, 29 Am. Dec., 468; *Beardslee v. Richardson,* 11

96 and note; *Schwerin v.* 481; *Canfield v. Balti-*Am. Rep. 268. But after the animal escaped by s stolen, as was done in loss in a way that dis-he burden shifts to the he defendant to go fur-gligence on his part, be-shifts the burden to the Sec. 23, 3rd Ed. The ty or return of the ani-*a prima facie* exoneration of of negligence or want Sec. 20, citing *Arrington* 691, 97 A. S. R., 562, 26 from the foregoing au-n this respect. The only mony was as to the char-and as the evidence was erdict of the jury will not

hat the lower court erred lt against one of the de-t file any answer. This ction was begun without t after the answer was his defendant was made upon him, but no further and, as it was stipulated al, and no objection was or answer as to this de-ade for default until two ms plain that the action defendants without re-third defendant or any

answer on his part, the pleadings between the other parties being regarded no doubt as sufficient for all three defendants.

Third, plaintiff contends that the judgment should be reversed because the trial was had before a special jury instead of the regular panel; a sufficient answer to this contention is, that no objection or exception appears in the record concerning the matter; nor to indicate that the plaintiff was prejudiced thereby. It is true the plaintiff in error has inserted in the assignment of errors and in the printed abstract of the record that the case was tried by a special jury without his consent and over his objections and exceptions, but there is nothing of this sort in the record.

Judgment Affirmed.

Decided March 8th, A. D. 1915. Rehearing denied April 12, A. D. 1915.

[No. 4119.]

CITY OF TRINIDAD *v.* COUNTY COMMISSIONERS OF LAS ANIMAS COUNTY.

COUNTIES—*Not Liable for the Repair of Highway Bridges within Towns and Cities.* A county is not chargeable with the expense of repairing a bridge which is part of a public highway of the county, but within the limits of an incorporated town or city.

The provision of Rev. Stat., sec. 6577, which assumes to impose this liability, is without effect, because not referred to in the title of the enactment. *Nelson v. Garfield County*, 6 Colo. Ap. 279, followed. (208, 212.)

Error to Las Animas District Court. HON. A. WATSON MCHENDRIE, Judge.

Mr. A. E. MCGLASHAN for plaintiff in error.

Mr. ROBERT T. YEAMAN for defendant in error.

BELL, J.

A complaint was filed in the District Court of Las Animas County, Colorado, setting up that the plaintiff was a municipal corporation, known as a city of the second class, and was charged as such with the care, supervision and control of all public highways, bridges and streets within its limits; that it was the duty of such city to cause said highways, bridges and streets to be kept open and in repair, and free from nuisances, and in a reasonably safe condition for travel; that it was the duty of the County of Las Animas, under the law, to repair, or repay said plaintiff for repairing, all public bridges within the limits of said city, exceeding 40 feet in length, over any stream crossing a state or county highway; that the Linden Avenue and West Main Street bridges, each within the boundary lines of said city, and each exceeding 40 feet in length, over a stream crossing a state or county highway, was, in May and June, 1913, out of repair and unsafe and dangerous for use and travel; that during said time, said city put said bridges in a proper state of repair at a necessary expenditure of $1,015.16; that the bill for said repairs was duly verified and presented to the Board of County Commissioners of said county, with a request that the same be allowed; that said bill was rejected; and that an appeal was taken to said District Court.

A general demurrer to the complaint was filed and by Judge McHendrie, sustained for the sole reason, as it was said:

"That the Appellate Court in the case of *Nelson et al. v. Board of County Commissioners of Garfield County*, 6 Colo. App., 279, 40 Pac., 474, has determined that the Board of County Commissioners of a county have no authority to appropriate and expend any of the county road and bridge funds to either construct or repair a bridge within the corporate limits of a city."

Section 6577, R. S., 1908, was discussed in the case cited and relied upon, and reads as follows:

"The city council shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair, and free from nuisances. All public bridges exceeding forty feet in length, over any stream crossing a state or county highway, shall be constructed and kept in repair by the county; Provided, that the city council may appropriate a sum not exceeding ten dollars per lineal foot to aid in the construction of any county bridge within the limits of such city, or to aid in the construction of any bridge contiguous to said city on a highway leading to the same, or any bridge across any unnavigable river which divides the county in which said city is located from another state."

We have examined the records and briefs filed in the *Nelson* case, and find that able counsel therein were agreed that the section above quoted did not confer power on the Board of County Commissioners to build or repair bridges, and could not, because of the inhibition in sec. 21, art. 5, of the State Constitution, against legislation unless the subject thereof should be clearly expressed in its title. In speaking of the section of the Revised Statutes here under consideration, counsel in the *Nelson* case, in their endeavor to sustain the right of the Board of County Commissioners of Garfield County to construct a bridge across the Grand River within the corporate limits of the town of New Castle, made the following significant admission in their brief, to-wit:

"If it should be argued that this statute gave counties power (to build bridges), the argument would tend to destroy the statute itself, because the section is a portion of an act entitled 'An act in relation to muncipal corporations' and is under the sub-title of 'cities,' and is an act which has no reference to counties. Under sec. 344 of the Consti-

tution, Mills, (sec. 21, art. 5), the statute would be void to the extent it undertook to give counties power, if it should be held that it was by force of this statute that counties are given power to build bridges within cities, because the 'subject' of the act would not then 'be clearly expressed in its title.' This would be otherwise if the section under discussion were contained in the chapter on 'Roads and Highways.' "

The unconstitutionality of the section we are here considering was forcibly presented to the former Court of Appeals in the *Nelson* case by counsel for Nelson et al., plaintiffs in error therein, and the soundness of their position was conceded by the opposing counsel. After examining the briefs and record filed in said case, and the judgment of the court thereon, we must infer that the court agreed with counsel on both sides that so much of said section as purports to permit counties to construct and repair public bridges exceeding 40 feet in length, over any stream crossing a state or county highway, is unconstitutional because the subject of the act is not clearly expressed in its title. However, counsel for defendants in error therein insisted that said section assumed the existence of the right of counties to construct bridges, and they argued that said section performed a useful function as a legislative construction, as it were, of sec. 3931, vol. 2, Mills' Annotated Statutes. This last mentioned section provides that the county authorities may lay out county roads and build bridges within the limits of their counties, without any specific reference as to whether they are within or without the boundaries of towns or cities.

The court, in the *Nelson* case, considered the same general question of the power of County Commissioners to construct bridges within incorporated cities or towns, and among other things, held that the Colorado statutes contained no specific provision restricting the powers of Boards of County Commissioners to such parts of the county as were

not included within incorporated cities and towns. Nevertheless, it further held that the authority to construct bridges in such cities and towns was exclusively within the jurisdiction of such incorporated cities and towns, and cited as authorities for such holding, the following, viz.:

In re Public Road, 54 N. J. Law, 539, 24 Atl., 759; *City of Goshen v. Myers,* 119 Ind., 196, 21 N. E. 657; *McGrew v. Stewart,* 51 Kan. 185, 32 Pac. 896; *Peoria & P. U. Ry. Co. v. People ex rel.,* 144 Ill., 458, 33 N. E. 873; *Clark v. Commonwealth,* 14 Bush (Ky.), 166; *Gallaher v. Head et al.,* 72 Iowa, 173, 33 N. W., 620; *Tucker et al. v. Conrad,* 103 Ind., 349, 2 N. E., 803; *State v. Jones,* 18 Tex., 874; *Cowan's Case,* 1 Overt (Tenn.), 311; Roads & Streets, Elliott, chap. 19. Further it said:

"The whole subject is covered by the three chapters of the General Statutes, 23, 95, and 119 (109). Each organization is clothed with ample power to carry out the declared purposes for which they are organized, and within their respective limits are given full power and control in the one case over highways and in the other case over streets and bridges. This delegation of authority has been held to be entirely within the power of the legislature, and when granted and exercised under the grant, to be entirely exclusive." Citing

City of Denver v. Dunsmore, 7 Colo., 328, 3 Pac., 705; *City of Boulder v. Niles,* 9 Colo., 415, 12 Pac., 632; *Denver & S. F. R. Co. et al. v. Domke et al.,* 11 Colo., 247, 17 Pac., 777.

That part of sec. 6577, R. S., 1908, which authorizes counties to construct and keep in repair all public bridges exceeding forty feet in length, over any stream crossing a state or county highway, although within the limits of a city, is very unusual. Counsel for plaintiff in error in the instant case admits that said section is identical with an Iowa statute, and that he has been unable to find any such statute in any other state.

The Supervisors of Green County, Iowa, attempted to lay out a county road within the unplatted portion of the site of the incorporated town of Jefferson, Iowa. The Supreme Court of Iowa, in discussing a contest over the authority of the Supervisors, said:

"Boards of supervisors have the power and authority to establish highways. (Code, sec. 920.) This general grant of power is not in terms restricted to territory *not* within an incorporated town or city. Cities and incorporated towns have also the power to 'lay off, widen, straighten, narrow, vacate, extend and establish' streets and alleys. (Code, sec. 464.) Such power is limited to territory within the corporate limits. If boards of supervisors have the power to establish highways over the same territory, then they and cities and towns have the same power. This clearly is not desirable, and we think was not contemplated. * * * It seems to us that, when the several powers so conferred on municipal corporations are considered, the jurisdiction and power of such corporations over territory within the corporate limits must be regarded as exclusive for the purpose of establishing highways or streets on or through such territory. * * * Public bridges are a part of a highway." (Italics are mine). *Gallaher v. Head et al.*, 72 Iowa, 173, 174, 175, 33 N. W., 620, 621.

The Supreme Court of Iowa, in harmony with our former Court of Appeals in the *Nelson* case, *supra*, held, in *Gallaher v. Head et al., supra*, and in other Iowa cases therein cited with approval, in effect at least, that the general powers given by the Iowa statutes to incorporated cities and towns over their streets and alleys vested them with exclusive power in the premises, where not limited in specific terms.

It is the opinion of the court that the same principle involved in the instant case was determined and declared in the *Nelson* case adverse to the contention of the plaintiff in error herein, and no sufficient reason appears which would

justify a modification of the principle so declared; and, therefore, the judgment under consideration is hereby affirmed.

Affirmed.

CUNNINGHAM, P. J., not participating.

Decided March 8th, A. D. 1915. Rehearing denied April 12th, A. D. 1915.

[No. 4122.]

EQUITABLE SURETY CO. *v.* CONNERS.

1. EVIDENCE—*Deed—Recitals of Consideration Paid.* The recital, in the conveyance of land, of the consideration paid, is only *prima facie* evidence, and may be contradicted. Action against the surety of a contractor for the erection of a building, its liability being limited to $1,750.00. The contractor had conveyed the premises whereon the building was to be erected to the other party to the contract, the plainiff in the action, by a deed reciting the payment of $1,750.00 as the consideration. The surety contended that the deed showed, in effect, that plaintiff had received from the contractor the amount so recited as full payment of the damages sustained by the non-performance of the contract. But the evidence showed that the sum recited in the conveyance was in fact the estimated value of certain premises theretofore conveyed by plaintiff to the contractor, that the premises conveyed by the deed were subject to encumbrances, exceeding the full value of the land with all improvements, and that the conveyance was not intended by the parties as a satisfaction of plaintiff's damages. Defendant's contention was therefore rejected. (215.)

2. PRINCIPAL AND SURETY—*Varying Terms of Contract to Surety's Prejudice.* A building contract, in which defendant was surety for the contractor, provided that a deed of the premises whereon the building was to be erected, which were the property of the contractor, should be delivered to the plaintiff upon the completion of the contract. Prior to the completion of the building a conveyance was prepared, executed by the contractor and deposited in escrow. The agreement evidencing the deposit provided that the deed should be delivered upon the completion of the building, or upon the failure of the contractor to complete it. *Held*, that this provision imposed no additional burden upon the contractor or the surety, and had not the effect to discharge the surety. (216.)

Error to Pueblo District Court. HON. J. E. RIZER, Judge.

Mr. JULIAN G. DICKINSON for plaintiff in error.

Mr. JOHN W. ELWELL for defendant in error.

KING, J., delivered the opinion of the court.

Writ of error to review a judgment in favor of plaintiff below. The parties will be referred to as plaintiff and defendant.

September 18, 1912, Peter F. Boese, hereinafter called the contractor, entered into a written agreement with plaintiff, whereby the contractor agreed to build a house accordingto the terms of the contract, on lots owned by himself, to be completed by December 1, 1912, and, when completed, to convey to plaintiff said lots, with all improvements thereon, by warranty deed, free from all liens and encumbrances. Defendant is a surety company. For the faithful performance of said contract, the defendant company executed its bond as surety for the contractor, limiting its liability to the amount of $1,750. In accordance with the terms of the contract, plaintiff paid the contractor $1,950 in money and property, at and prior to the time the foundation of the house was completed, to-wit, on or about October 5, 1912. Fifteen hundred and fifty dollars, the balance of the contract price, was to be paid only when the contract was fully performed. November 18th, the contractor executed a warranty deed, whereby the lots were conveyed to plaintiff, and delivered the deed to a third person, with an escrow agreement signed by the contractor and plaintiff, which provided that the deed should be delivered to plaintiff upon completion of the building contract, and further provided that in the event of the failure of the contractor to complete the contract, the deed was to be delivered. The contractor failed to further perform the contract; the deed was delivered to

plaintiff, December 2nd, but a prior encumbrance, and liens subsequently filed, exceeded in amount the value of the lots with the improvements thereon. Judgment was rendered for the plaintiff for the full penalty of the bond.

Defendant contends (1) that the plaintiff received from the contractor full payment for all damages sustained by failure to perform the contract, gave his receipt therefor, and is estopped by his receipt from claiming damage, and (2) that the contract was materially changed by the parties thereto, to defendant's damage, which alteration operated to discharge the surety. We cannot assent to either contention. The first is predicated on the warranty deed given by the contractor to the plaintiff, which deed recited a consideration of $1,750, and contained the usual acknowledgment of payment of the consideration by the grantee and receipt thereof by the grantor. But the evidence showed that the consideration, although recited in cash terms, was in fact the estimated value of real estate theretofore conveyed by plaintiff to the contractor, as an advance payment made on the contract at the time the bond was given, and the giving of which deed was the real consideration for the execution of the bond. Nothing in fact was paid by plaintiff at the time the deed was executed, and he received nothing thereby, except a worthless equity in the lots described in the deed. The deed did not, by its terms, purport to be given or accepted in satisfaction or discharge of plaintiff's damages sustained by failure to perform the contract. The evidence shows that it was not so intended. If anything of value had passed to plaintiff by said deed, it would be held to discharge the damage, *pro tanto*, but, as has been stated, the liens and encumbrances exceeded the contractor's equity. If anything had been paid by plaintiff to the contractor at that time, or thereafter, defendant's liability would have been reduced, to that extent, under the subrogation clause in the bond. The recitals in a deed, of consideration therefor, and the acknowledgment

of payment of the consideration, or receipt thereof, are only *prima facie* evidence of the amount, the payment or the receipt, and are open to explanation, and may be disproved, except that the law conclusively presumes a nominal consideration to support the validity of the deed. Further than that, they do not amount to an estoppel. *Fechheimer v. Trounstine*, 15 Colo., 486, 24 Pac., 882; *Hubbard v. Mulligan*, 13 Colo. App., 116, 57 Pac., 738; *Guldager v. Rockwell*, 14 Colo., 459, 24 Pac., 556.

The second contention is based on the escrow agreement made when the aforesaid deed was executed and delivered as an escrow. The original agreement provided that the deed should be delivered when the contract should be completed. The escrow agreement made the same provision, but further provided that upon failure of the contractor to complete the contract, the deed should be delivered. This escrow agreement was made November 18th, after it became apparent that failure to perform the contract was probable, if not certain. We think this collateral or auxiliary agreement did not materially vary the terms of the original contract; but, in so far as it did vary therefrom, it was in no manner detrimental to defendant. It imposed no different liabilities nor additional burdens upon either the principal or the surety, and there is no reason why it should operate to discharge the surety.

We find no error in the admission of testimony. The judgment is affirmed.

Affirmed.

Decided March 8th, A. D. 1915. Rehearing denied April 12th, A. D. 1915.

[No. 4147.]

INTERSTATE SAVINGS AND TRUST CO. ET AL. V. WYATT.

1. JUDGMENT—*Name of Plaintiff.* Action by one Wyatt upon a judgment recovered in another state. It was contended that the exemplification produced showed a judgment recovered by Morris and not by Wyatt. But the record declaring that "Nannie Morris, whose name is now Nannie Wyatt, be and hereby is," etc., the contention was rejected. (218.)

2. —— *Of Another State.* Any duly authenticated transcript of a judgment recovered in the court of another state is, in general, entitled to full faith and credit in the courts of this tate. (218, 219.)

But the courts of the state where the judgment of another is sought to be enforced will inquire (1), As to whether the court in which a judgment was rendered had jurisdiction; (2), Whether it was given upon the penal statute, and (3), As has been held, whether the law under which it was recovered is repugnant to justice, or good morals, offends the policy of the latter state, or is calculated to injure such state or its citizens. (219.)

Each state should recognize and enforce the public acts and judgments of every sister state, not coming within one or more of the exceptions.

3. STATUTES—*Extra Territorial Effect.* As a general rule the laws of one nation are without extra territorial effect, except upon the principles of comity. As between the states of this Union the same rule obtains, limited by the full faith and credit clause of the Federal constituion. (218.)

4. —— *Penal—What Are.* The name ascribed to a statute by the legislature which enacts it, or the courts of the same jurisdiction, is not the test of its character as to whether penal or not when the question arises in another jurisdiction; but whether it is in essence and effect a provision for the punishment of an offense against the public, or the grant of a civil right to a private person. (223.)

A statute of Texas allowing the recovery of usurious interest paid to the usurer was held not a penal statute, in such sense as to prohibit a recovery here, upon a judgment given thereunder in one of the courts of Texas. (224.)

Error to Denver District Court. HON. GEO. W. ALLEN, Judge.

Mr. J. FOSTER SYMES, for plaintiffs in error.

Messrs. ROBINSON & ROBINSON and Mr. JOHN PAUL LEE for defendant in error.

MORGAN, J.

Writ of error to reverse a judgment obtained by Mrs. Wyatt in the Denver District Court against the defendants there, plaintiffs in error here, on a judgment she had previously obtained against the defendants in the state of Texas.

The first contention is that the Texas judgment sued upon showed on its face that it was in favor of Nannie D. Wyatt, and that the suit had been brought by Nannie D. Morris, and that there was nothing in the authenticated copy of the proceedings showing that the names referred to the same person. The judgment shows on its face that—"the plaintiff, Nannie D. Morris, whose name is now Nannie D. Wyatt do have and recover, etc.," and again it shows that —"the plaintiff Nannie D. Wyatt *nee* Nannie D. Morris be and she is hereby, etc." It is concluded from these statements in the judgment that this contention is without merit.

The next and the principal contention is that the Texas judgment sued upon was a recovery on a penal statute of the state of Texas, and, therefore, the courts of this state should decline to enforce such judgment, because "the courts of no country execute the penal laws of another," as stated by Chief Justice Marshall in *The Antelope case*, 10 Wheat., 66, 123.

To reach a conclusion herein it is convenient to state two general propositions of law; first,—as a general rule the laws of a nation have no extra-territorial force, except upon the principles of comity; and, between the states of this Union, the same rule applies, except as governed by the "full faith and credit" clause of the constitution of the United States and the acts of Congress; second,—the general rule, as between the states of this Union, without the full faith and credit clause, aforesaid, the duly authenticated "judicial proceedings" and judgments of a sister state, would be only *prima facie* evidence thereof in a suit thereupon in another state, but, under the full faith and credit clause, aforesaid, any duly authenticated record of the proceedings and judgment from the courts of another state are given full faith

and credit when sued upon in a sister state, subject to a few generally accepted exceptions, to-wit: the judgment sued upon in a sister state may be inquired into for the purpose of ascertaining whether the tribunal in which it was obtained had jurisdiction, and whether it was obtained through the enforcement of a penal law of the other state; and it has been held, also, that its enforcement in a sister state may depend upon whether the law under which it was obtained is repugnant to justice or good morals, or offends the policy of the state in which it is sought to be enforced, or is calculated to injure such state or its citizens.

Therefore the question here is, was the lower court, when it recognized the Texas judgment and enforced it, executing a penal law of the state of Texas, within the exception above stated. Upon the weight of authority, this question must be answered in the negative, and the judgment affirmed.

Mrs. Wyatt recovered the judgment in Texas by virtue of its usury law which provides that:

"If usurious interest, as defined by the preceding articles, shall hereafter be received or collected, the person or persons paying the same, or their legal representatives, may by action of debt, instituted in any court of this state having jurisdiction thereof, within two years after such payment, recover from the person, firm or corporation receiving the same, double the amount of the interest so received or collected."

It has been held by the Supreme Court of Texas in *Baum v. Daniels*, 118 S. W. 754, 757, that the foregoing statute is only "penal in its nature," and that an action for recovery under said statute "is a civil suit, and the judgment rendered is a civil recovery, and not a conviction of a crime." Such decision is not referred to as binding upon the courts of this state, but it is cited for the reason that it shows a construction of the statute by the court of the state enacting it, and must have its weight in determining the principal question

involved, that is, whether the judgment sued upon herein was recovered through the enforcement of a penal law, on the hypothesis that this court may go behind the judgment sued upon and determine that question.

In the case of *Huntington v. Attrill,* 146 U. S., 657, 667, 13 Sup. Ct., 224, 227 (36 L. Ed. 1123), Justice Gray, discussing the maxim stated in *The Antelope* case, *supra,* and citing *United States v. Reisinger,* 128 U. S., 398, 402, 9 Sup. Ct., 99, 32 L. Ed. 480, and *United States v. Chouteau,* 102 U. S., 603, 611, 26 L. Ed. 246, said:

"In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily they denote punishment whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws."

The learned justice further says:

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal." *Id.*

Huntington v. Attrill has been followed, in its construction, as to what is a penal law in an international sense, in the following cases: *Brady v. Daly,* 175 U. S., 148, 20 Sup. Ct., 62, 65, 44 L. Ed. 109; *Boston & M. R. R. v. Hurd,* 108 Fed., 116, 119, 47 C. C. A. 615, 56 L. R. A. 193; *City of Atlanta v. Chattanooga F. & P. Works,* 127 Fed., 23, 29, 61 C. C. A. 387, 64 L. R. A. 721; *Malloy v. Amer. H. & L. Co.,* (C. C.), 148 Fed., 482, 483; *Gruetter v. Cumberland T. & T. Co.,* (C. C.), 181 Fed., 248, 255; *Langdon v. Penn. R. R. Co.,* (D. C.), 194 Fed., 486, 495; *Strait v. Yazoo & M. Co.,* 209 Fed., 157, 164, 126 C. C. A. 105, 49 L. R. A. (N. S.), 1068; *Higgins v. Central, etc., R.,* 155 Mass., 176, 29 N. E.

534, 31 Am. St. Rep. 544. Following these cases, it is concluded that, while the statute is penal in its nature, it is not penal in an international sense; in other words, the judgment upon it is the same as if recovered in any civil action, so far as its enforcement is concerned here.

It has been held that if the recovery allowed is more than mere compensation the statute is considered penal in part, in an international sense, but such holding is not universal. A few cases to that effect are: *The State v. C., B. & Q. R. Co.* (C. C.), 37 Fed., 497, 3 L. R. A. 554; *Dale v. A., T. & S. F. R. R. Co.*, 57 Kan., 601, 47 Pac., 521; *Raisor v. Chic. & A. R. Co.*, 215 Ill., 47, 74 N. E., 69, 106 Am. St. Rep., 153, 2 Ann. Cas. 802; *First Nat. Bank v. Price et al.*, 33 Md., 487, 3 Am. Rep. 204; *Cristilly v. Warner*, 87 Conn., 461, 88 Atl., 711, 51 L. R. A. (N. S.) 415. Some of these cases, and others not cited, base the conclusion upon the decisions in the jurisdiction of the statute construing it, and others on the ground that the statute is contrary to the policy of the forum where the action is brought, and others cannot be distinguished.

In instances where the state is the complainant, under the statute, and where the statute provides a recovery for the benefit of the state in vindication of its public rights, many of the decisions are plain that the statute is penal in the international sense, and will not be enforced or adjudicated in another state, even if a judgment has been first obtained in the state where the statute was enacted. *Wisconsin v. The Pelican Ins. Co.*, 127 U. S., 220; *State of Ark. v. Bowen*, 20 D. C., 291; *Huntington v. Attrill, supra.*

But great difficulties are presented, and the authorities are conflicting, when the complainant under the statute is a private citizen, and the statute authorizes a civil action to recover in his favor, and for his use. In such instances two conditions arise; first, when a judgment has been obtained in the state where the law was enacted, and second, where a suit is brought in a sister state without first obtaining a

judgment in the state where the law was enacted. In the present case, judgment was first recovered in the state of Texas, and suit was brought upon it here; but, as held in the *Pelican* case, *supra,* this court will not distinguish between the two conditions. It is sufficient to say that a few courts have thought the distinction worth of notice. These cases, however, seem to extend the full faith and credit clause of the constitution beyond its actual import. These cases are discussed, but not followed, in the *Pelican Ins. Co.* case, *supra.*

The weight of authority, and the most logical reasoning, is that the court may go behind the judgment, to ascertain if the court that rendered it had jurisdiction of the subject matter and of the parties, and other exceptions to the full faith and credit clause, only one of which it is thought necessary to consider here, to-wit: *whether the judgment was obtained through the enforcement of a penal statute, in an international or interstate sense. Huntington v. Attrill, supra; Bryant v. Ela, supra; The Pelican Ins. Co.* case, *supra; Lamb v. Poudre River Livestock Co.,* 132 Fed., 434, 65 C. C. A., 570, 67 L. R. A., 558; 2 Black on Judgments, sec. 870.

The statute of Texas, by virtue of which the judgment sued upon was obtained, was held to be "penal in its nature" in the case of *Baum v. Daniels, supra,* and such a statute in this state would no doubt be held to be penal in its nature by the courts of this state as indicated in the case of *Jenet v. Albers,* 7 Colo. App., 271, 274, 43 Pac., 452, and *Fairbanks & Co. v. McLeod,* 8 Colo. App., 190, 193, 45 Pac., 282; consequently the only question is, as heretofore stated,—was the Texas statute penal in its interstate sense? Or,—does it come within that particular exception to the full faith and credit clause of the constitution and act of Congress? It does not inexorably follow, because a statute is penal in its nature and allows a recovery by a private citizen for a penalty prescribed, that it is penal in its interstate sense when

subjected to the crucible provided by the full faith and credit clause aforesaid. *Huntington v. Attrill, supra.* The courts of each state may decide such question for themselves. Each state has the right to decide whether its sovereignty has been invaded, subject only to the provisions of the Federal Constitution and the acts of Congress. *Bryant v. Ela, supra; Dougherty v. Am. McKenna Co.*, 255 Ill., 369, 99 N. E., 619, Ann. Cas. 1913D, 568.

While the states of this Union are independent sovereignties, except only so far as the constitution of the United States consolidates them, nevertheless they are sister states, allied by a comity much closer than nations, generally, as they have indicated by the power they have delegated through the constitution to the Congress, clearly showing an intention to encourage a similarity of laws and judicial proceedings, and to establish between themselves a comity closer than that recognized by international law; and unless the public acts and judicial proceedings of one state invade the sovereignty of another, the courts of a sister state should not be astute to find or search for an excuse to deny that full faith and credit which they have required in the Federal Constitution, but each state should recognize and enforce the public acts and judgments of a sister state, when not coming clearly within one or more of the exceptions.

It was said by Justice Gray in the *Huntington v. Attrill* case that:

"The test is not by what name the statute is called by the legislature or the court of the state in which it was passed, but whether it appears to the tribunal, which is called upon to enforce it, to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person."

It was said in the case of *Lamb v. Poudre R. L. Co., supra,* that the judgment of a court of one state "gives a right of action for its enforcement, subject to limitations or other laws of the forum, which regulate, but do not deny,

unreasonably restrict, or oppressively burden, the exercise of that right."

It was said by this court in *Bonfils v. Gillespie*, 25 Colo. App., 496, 499, 139 Pac., 1054, "that there has been a well marked distinction between foreign judgments and judgments of sister states," since the adoption of Art. 4, Sec. 1, of the Federal Constitution and the Act of Congress in pursuance thereof, which provide that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

The statutes of Texas provide no other way to insure obedience to its usury law; and the taking of interest, more than the rate prescribed, is not denominated a crime or misdemeanor, nor is any fine imposed for its violation, nor is there any provision permitting the state to recover anything, itself, by reason of the law, hence it is in no sense a criminal law, nor strictly penal, in an interstate sense.

In following the *Huntington v. Attrill* case, and the Federal cases above cited, and holding that the Texas statute is not penal in an international sense, and that judgments of one state, which will not be enforced in a sister state should be confined to those concerning "public wrongs as distinguished from private rights," this court upholds that comity between the states that it believes was intended by the full faith and credit clause of the constitution and the act of Congress.

Judgment Affirmed.

Decided March 8th, A. D. 1915. Rehearing denied April 12th, A. D. 1915.

[No. 4153.]

POST ET AL. V. LANG.

1. APPEALS AND ERROR—*Verdict upon Conflicting Evidence*, when sufficient, will not be disturbed, if the case was fairly submitted upon proper instructions. (227.)

2. —— *Objections Not Taken Below.* Improper statements of counsel not objected to at the time will not be considered upon appeal. (231.)

3. EVIDENCE—*Expert Opinions—Competency.* Landlord's action for rent of a storehouse. The tenants had abandoned the premises, because, as they alleged, of the unsafe condition of the foundation walls, attributed to a flood which filled the basement. The opinions of architects, builders and building inspectors, based upon examination made at periods of from three to nineteen months subsequent to the flood, were held properly admitted. (230.)

4. —— *Admissions—By Silence.* A letter written by one of defendants to plaintiff, shortly before defendants abandoned the store-room, stating that defendants had purchased a building and were removing thereto, but making no allusion to the supposed insecurity of the store-room, was held properly admitted. (230, 231.)

5. INSTRUCTIONS—*To Be Taken as a Whole.* Instructions given, fairly including the doctrine of those refused, toll the error. (231.)

Error to Denver District Court. HON. CHAS. C. HOLBROOK, Judge.

MESSRS. MURRAY & INGERSOLL, MR. WENDELL STEPHENS, for plaintiffs in error.

MR. H. E. LUTHE, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

On October 7, 1913, plaintiff (defendant in error) brought an action against defendants (plaintiffs in error) to recover a judgment for $1,890, alleging an indebtedness of that amount for nine months' rent (from February to October, inclusive, 1913) on certain premises on Blake street, Denver, Colorado, at the agreed price of $210 per month. It appears from the complaint that defendants occupied the premises in question from April 1, 1911, to

December 1, 1912, under a three years' lease, entered into between them and plaintiff, which by its terms began April 1, 1911, and terminated April 1, 1914.

The answer admits the execution of the lease and the occupancy of the premises as alleged; but defends the action upon the ground that at the time of the execution of the lease the foundation walls of the premises were of weak, porous, faulty material and construction, which fact was well known to plaintiff at that time, and unknown to defendants; that after making and delivering the lease as aforesaid the premises, on July 14, 1912, while occupied by defendants, were so injured by water (through no fault of theirs) as to render the premises untenantable, unsafe and unfit for occupancy; that such injury was occasioned by a sudden, unforseen and extraordinary flood, and that by reason thereof defendants, under the terms of the lease, ceased to be liable thereafter for the payment of rent as provided therein; that plaintiff was informed of the untenantability of the premises as aforesaid, but failed and refused to make the same safe and fit for occupancy, and to restore the same to a tenantable condition; for which reason defendants quit and surrendered possession of the premises to plaintiff.

The case was tried to a jury and verdict rendered in favor of plaintiff for the full amount of rent sued for, with interest thereon, upon which verdict judgment was rendered. Defendants sued out a writ of error in the Supreme Court, and the case is here for disposition.

But few questions of law are involved in this proceeding. As to all the material issues of fact the evidence was sharply conflicting.

A large part of the briefs on behalf of both parties is devoted to a discussion of the weight, force and effect, which should be given to the testimony of witnesses, and the the deductions which ought to be made therefrom, as well as the facts established thereby. All material issues of facts being fairly in dispute, we do not feel warranted

in discussing the weight or credibility which ought to be given to the testimony adduced at the trial. That duty devolved upon the jury. A general verdict was returned, and we are called upon to review the evidence and proceedings below to ascertain therefrom if the verdict and judgment are supported by the record.

We agree with defendants' counsel in their assertion that the commanding question of fact controlling this controversy is: Were the premises rendered untenantable by the flood of July 14th, and if so, were the subsequent actions of plaintiff or defendants such as to relieve the latter of their liability to pay rent for the full term of the lease? A great deal of testimony was adduced by both parties upon this issue. Defendants vigorously contended at the trial (as they do here) that the water from the flood flowed into the basement of the premises and so affected the brick and mortar constituting its walls as to render the building unsafe, dangerous and untenantable; that plaintiff, after such damage or injury, failed and neglected to repair the injury done, in such a way as to make the building safe and tenantable, and for that reason they claim there was no further liability on their part to pay rent, under the terms of the lease, subsequent to December 1, 1912, the day they vacated the property. In support of such claim they rely to a great extent upon the fllowing clause found in the lease, viz.:

"That in case said premises shall become untenantable by reason of fire or otherwise, the rent shall cease while the same are being repaired; but that nothing herein contained shall be construed so as to compel the lessor to rebuild or repair said premises in case of destruction, unless he so desires."

On the other hand, plaintiff contends with equal zeal that the injury to the basement walls from the flood (if there was any injury), was of no moment, was not of a serious or permanent nature, and did not render the build-

ing dangerous or unsafe, or untenantable, except for a very short time while the flood waters remained in the basement. It is further claimed by him that, under the terms of the lease, defendants were to make general and ordinary repairs; that, a few days after the flood, defendants undertook to and did repair the damage, by placing posts and girders lengthwise through the basement, and rendered a bill therefor to plaintiff, which he paid; that all floors above the basement were used by defendants, after the flood, the same as they had been theretofore; that defendants continued to use and occupy the premises for more than three months after the flood, before they began to vacate the same, which was an unreasonable time upon which to predicate their right of abandonment of the premises upon the ground of danger or untenantability of the premises; that all the water had disappeared from the basement three or four days after the flood; that the walls of the basement were twenty-one inches thick; that defendants stored some goods in the basement after the posts and girders were put in; and that the evidence clearly shows the premises were never unsafe for occupancy, either before or after the flood, and were at no time untenantable, except that the basement only was untenantable for a few days immediately following the flood.

The evidence is undisputed that the flood was of an extraordinary and unusual nature; that, at that time, defendants had goods or merchandise in the basement of the permises, which were damaged; that, shortly after the flood, under the advice of an architect, defendants caused posts and girders to be placed in the basement, the expense of which they called upon the plaintiff to pay, which he did; that defendants remained in the occupancy of the premises for over three months after the flood, and then began to move their goods out, and continued to so remove them until November 30th following, at which time they tendered the keys of the premises to plaintiff, after paying all rent due

up to and including the last mentioned date.

Whether or not as a matter of fact there was an inherent defect in the basement walls, arising from defective brick or mortar, or from defective foundation; or the flood waters of July 14th affected the same in a degree that made the building unsafe for occupancy thereafter; or the premises, including the basement, were safe and tenantable for use by defendants after the girders and posts were placed in the basement, were controlling issues in the case, and the determination of such issues by the jury was decisive of the controversy between the parties as to those issues. Such issues were fairly submitted to the jury, under proper instructions, and their findings were adverse to defendants' contentions in that regard. The jury having so found. it is evident that defendants were liable for the full payment of rent during the unexpired term of the lease.

As to the safety of the building before and after the flood, a number of architects, brick contractors and building inspectors, including deputies, of long years' experience, testified as experts on behalf of plaintiff. Their testimony was positive, and to the effect that the building was, and had been, sound and safe for occupancy at all times before and after that time, and up to the time they made their examinations. As against this testimony, defendants' witness Baerresen, an architect of repute and experience, testified exactly to the contrary. But the jury appears to have found that issue in favor of plaintiff. Defendants, however, complain of the rulings of the court in admitting such testimony of plaintiff's witnesses, over their objections, and assert the same to have been fatal error, for the reason that none of such witnesses examined or inspected the building to ascertain its safety or unsafety, until months after the flood had occurred, covering a period of from three to nineteen months subsequent thereto. We are of the opinion that the court did not err in such ruling. The record discloses that the testimony of such witnesses was based upon careful

inspection and examination of the basement walls of the building after the flood. They testified that two holes were made in different places in these walls, at their suggestion, which disclosed that they were twenty-one inches in thickness and constructed of good, hard brick and mortar; that they were unaffected by any prior action of water thereon; that in their opinion they were sound, well constructed, and of a permanent nature, which rendered the building absolutely safe for occupancy, and had been of equal safety and sound construction at all times prior to the examination; that in fact the building became more safe and secure as time passed by, by reason of the walls thereby becoming more homogeneous. We think the testimony of such experts was admissible as evidence to go to the jury for what it was worth. The jury might have considered it as being entitled to less credence or weight, by reason of the fact that the examinations upon which it was based were made months after the flood occurred, but if so this would not render the evidence inadmissible as expert testimony. *McCulloch v. Dobson et al.*, 133 N. Y. 114, 30 N. E. 641; *Marston v. Dingley*, 88 Me., 546, 34 Atl., 414; *Huber Mfg. Co. v. Hunter*, 99 Mo. App. 46, 72 S. W. 484.

Defendant Harry H. Post was a witness at the trial, and during his cross-examination identified a letter written by defendants to plaintiff, on October 23, 1912; whereupon it was offered in evidence by plaintiff and admitted over the objections of defendants, who insist that the ruling was erroneous and highly prejudicial to their rights, laying great stress upon this supposed error. All the letter contained was a brief statement to the effect that defendants had bought a building and were then engaged in moving thereto some of their goods from the leased premises, and requesting plaintiff to call on their attorneys, who would take up with them the matter of the lease, which was in their possession. As we read the letter it does not contain a word or sentence which could be reasonably interpreted as

prejudicial to defendants' case. The fact that the letter contained nothing about the untenantability of the premises, was a circumstance that might properly be considered by the jury with the evidence, as bearing upon the good or bad faith of defendants' claim that they abandoned the premises on account of their untenantability. If it was error to admit the letter on cross-examination it was error without prejudice. The statements of plaintiff's counsel, accompanying its admission, could not affect its admissibility as evidence. As to whether or not such statements were improper, that is another question. They were not objected to, however, nor was any motion made to strike them out.

Defendants' next contention is that fatal error was committed by the court in refusing to give instructions numbered two, three, five and six, requested by them. We have carefully examined these instructions, and believe the contention to be untenantable. The substance of number two, so refused, seemed to be fairly included within instruction number three given by the court. The instruction refused was not complete, as it failed to recognize the evidence which tended to show that defendants, at the expense of plaintiff, immediately after the flood, made repairs which rendered the building safe and tenantable. The given instruction remedied the defect. The substance of refused instruction number three was given in instruction number three given by the court. Refused instruction number five was properly refused by the court, as it was not a fair statement of the law under the issues and evidence adduced. Instruction number six, tendered by defendants, was refused. It reads as follows:

"The jury are instructed that in weighing the evidence of experts they may take into consideration the time of an examination, and that the jury are the judges of whether an examination made at the time of damage is entitled to more or less weight than an examination made at a later

time, and that they have the right to find that an examination made after a lapse of ten months or more has less weight than an examination made immediately after the damage."

While it may be said that some parts of the instruction are good, other parts are argumentative and prejudicial, but on the whole it is bad, hence it cannot be said that the court committed error in refusing to give it as presented. In our opinion that part of the instruction which would have been proper to give to the jury was substantially incorporated in instructions given by the court, so in either case we think the action of the court in refusing to give the instruction is free from error.

Defendants allege error in the giving of instruction number three. The instruction in substance was that if the jury believed from the preponderance of the evidence that an unusual flood had injured the building and its walls to such an extent as to render it unsafe for the purposes for which it was leased, of which fact plaintiff had notice, and thereupon failed within a reasonable time to put it in tenantable condition, their verdict should be for defendants; unless the defendants made the repairs necessary for that purpose and presented the bill therefor to plaintiff who paid the same, in which event the verdict should be for plaintiff. We discover no error in this instruction, in view of the issues and evidence adduced at the trial. The record discloses a great real of evidence upon the facts alluded to in the instructions, most of which was conflicting. Under the terms of the lease, if the premises became untenantable (caused by fire or otherwise), the rent was to cease while repairs were being made. The evidence is undisputed that a few days after the flood of July 14th defendants, at the expense of plaintiff, made certain repairs by placing girders and posts in the basement of the leased building, and remained in possession thereof for over three months thereafter, before beginning to move out of the same. Defend-

ants, however, claim that such improvements were only temporary, and that the premises were unsafe and untenantable notwithstanding such repairs. This was also a material issue of fact which was properly left for the jury to determine.

A number of other questions have been presented by the briefs, but, having passed upon the three specific points which defendants have urgently pressed upon the attention of the court in their briefs, we see nothing in the other questions discussed that would warrant a different conclusion from that heretofore expressed. From our view-point the three points determined are decisive of this appeal.

The judgment will be affirmed.

Decided March 8th, A. D., 1915. Rehearing denied April 12th, A. D. 1915.

[No. 4021.]

MINTER v. KING.

1. CONVEYANCES—*Acknowledgment.* A certificate appended to a tax deed declared that "personally appeared," etc., one known to the officer granting the certificate to be treasurer of the county, and "the identical person who executed the conveyance,"—not in any manner declaring any acknowledgment by the person so appearing. The certificate was held a nullity. (235.)

And its defects not cured by any presumption arising from lapse of time.

2. EVIDENCE—*Presumptions.* Lapse of time has not the effect to raise the presumption of the acknowledgment of a conveyance of land, from the appearance, appended thereto, of an official certificate that the grantor personally appeared before the officer granting the certificate, without more. (235.)

3. TAX TITLES—*Deed Not Acknowledged,* is void. (236.)

4. LIMITATIONS—*Color of Title.* A treasurer's deed not acknowledged is not color of title. (237.)

Error to Baca District Court. HON. W. S. MORRIS, Judge.

MESSRS. JULIUS C. GUNTER and MALCOLM LINDSEY, for plaintiff in error.

Mr. JOHN F. MAIL, for defendant in error.

BELL, J.

This action was brought in the District Court of Baca County, Colorado, April 7th, 1910, by David B. Nowel against James F. Berger, John Minturn and others, for the purpose of quieting the title to lots 3 and 4, and the south half of the northwest quarter of Section 1, Township 29 S., Range 44 W., in said Baca County. After the issues were formed, it was substantially admitted between the contesting parties that Minter, plaintiff in error, received from the County Treasurer of Baca County a tax deed for the lands in question; that the same was duly recorded August 22nd, 1900; that on February 19th, 1901, Minter paid the 1900 taxes on said lands; that each year thereafter he duly paid the taxes for the preceding year, including the taxes for the years from 1900 to 1909, both inclusive, before this suit was brought; that all of said taxes were paid in good faith under said tax deed, and during all of said period the lands in dispute were vacant and unoccupied. Said County Treasurer duly signed said tax deed for the premises, and, seemingly, endeavored to acknowledge the same before the County Clerk of said County, who certified that, before him, personally appeared W. M. Stewart, Treasurer of said County, personally known to him to be the Treasurer at the date of the execution of the conveyance, and to be the identical person whose name was affixed to and who executed the same as treasurer of the county for the purpose therein expressed; but did not anywhere certify that said Stewart acknowledged the execution of the same. This left the attempted acknowledgment a nullity.

It is said to be a universal requirement that the certificate of acknowledgment shall recite the fact of acknowledgment, and where such recital is omitted the lapse of time will not raise any presumption of acknowledgment: Sec. 202, page 855, volume 1, Corpus Juris, citing, among many other cases, *Henderson v. Grewell*, 8 Cal., 581; *Bryan v. Ramirez*, 8 Cal., 461; *Heintz v. O'Donnell*, 17 Tex. Civ. App. 21, 42 S. W. 797. See also 1 Ruling Case Law, 286, Sec. 66, citing note to *Terise v. Bottego*, 108 Am. St. Rep., 521, 531.

Acknowledgment in its technical, legal sense means a formal declaration or admission before an authorized court or public officer, by a person who has executed an instrument, that such instrument is his act and deed: Corpus Juris., *supra*, 745. There is neither a declaration nor an admission of the grantor, in the certificate under consideration, that the tax deed was his act and deed; hence, no acknowledgment at all.

Sec. 3902, Mill's Ann. Stats., provides that the tax deed shall be signed by the treasurer in his official capacity, and attested by his official or private seal, and acknowledged by him before some officer authorized to take acknowledgments of deeds, and when substantially thus executed and recorded in the proper record of titles to real estate, shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and also all the right, title, interest and claim of the state and county thereto, and shall be *prima facie* evidence in all courts of this state in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, that said land or property was subject to taxation; that the taxes were not paid prior to sale; that said property had not been redeemed; that it had been listed and assessed legally; that the levy was properly made; that the property was legally advertised and sold for taxes as therein stated; that the grantee named was the purchaser or suc-

cessor in interest of such purchaser; and that the sale was conducted in the manner required by law.

The trial court held, in effect, that the failure of the treasurer to acknowledge the tax deed left the same inoperative, and that the same does not purport to convey title to the real estate described therein, and until a tax deed is acknowledged substantially as required by statute, it cannot become a colorable title.

A deed between private parties may be executed and delivered and made effective without acknowledgment or record; but it has been frequently held that a tax deed, under our statutes, not acknowledged substantially in the manner prescribed by statute, is void: *Sayre v. Sage*, 47 Colo. 559, 108 Pac. 160; *Empire Co. v. Bender*, 49 Colo. 522, 113 Pac. 494; *Little v. Howell*, 24 Colo. App., 128, 130, 124 Pac. 743.

In *Sayre v. Sage, supra*, the tax deed there in controversy was issued in 1893 and delivered to the purchaser, but was not recorded until September, 1898. The action was not commenced until December, 1902, or less than seven years after the tax deed was recorded. Gabbert, J., speaking for the Supreme Court, said:

"The deed in question had neither seal (official or private). The general assembly has the authority to prescribe the form and requisites of a tax deed. The treasurer, in executing such deed, acts under a naked statutory power, and in order that it shall be valid, it must comply substantially with the provisions of the statute prescribing its form. That it must be attested by the official or private seal of the treasurer is a positive requirement of the statute, and is as necessary to its validity as any other. Without one or the other of the seals specified, it is void. *Sutton v. Young*, 4 Neb., 319; *Deputron v. Young*, 134 U. S., 241, 33 L. Ed. 923, 10 Sup. Ct. Rep. 539; *Gue v. Jones*, 25 Neb. 634, 41 N. W. 555; *Reed v. Merriam*, 15 Neb. 324, 18 N. W. 137; *Gage v. Starkweather*, 103 Ill. 559; *Reed v. Morse*, 51 Kan. 141, 32 Pac. 900.

"* * * By virtue of the provisions of sec. 3902, 2 Mills' Stats., which recites, in substance, that when a tax deed is recorded in the proper record of titles to real estate it vests in the grantee all the right, title and interest of the former owner in and to the land thereby conveyed, a tax deed does not purport to convey any title to real estate until it has been filed for record in the proper office. Hence, it follows, that neither Sec. 2923-e nor Sec. 2924, *supra*, (Mills' Stats., Rev. Supp.), operates to give the grantee in a tax deed color of title until it has been filed for record. *Morris & Thombs v. St. Louis Nat'l Bank*, 17 Colo. 231, 29 Pac. 802; *Wason v. Major*, 10 Colo. App., 181, 50 Pac., 741."

Further, he held that "color of title can only arise out of a conveyance purporting to convey title to real estate," citing in support thereof *Omaha & Grant S. & R. Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 5 L. R. A. 236, 16 Am. St. 185; *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604.

The conclusions thus expressed in *Sayre v. Sage*, *supra*, to the effect that, until a tax deed is executed in substantial conformity with the requirements of the statute, and recorded, it does not purport to convey any title to the real estate described therein, and cannot operate as color of title, have been adhered to in many subsequent decisions of this and the Supreme Court. In *Empire Co. v. Bender*, *supra*, Bailey, J., speaking for the court, said:

"The tax deed offered in evidence, to support of defendant's adverse claim, was unacknowledged. *Without acknowledgement it is a nullity, and was not competent in evidence for any purpose.* Under the statute in force at the time of the execution of such an instrument, it was a prerequisite that the deed should be signed by the treasurer in his official capacity and attested by his official or private seal, and acknowledged, before some officer authorized to take acknowledgments of deeds, and when substantially thus executed and recorded in the proper records of title to real estate, it vested all the right, title, interest and estate of the

former owner in and to the lands conveyed. *Until the deed was thus executed, namely, signed by the treasurer in his official capacity, attested by his private or official seal, and acknowledged, it was no deed.* Mills' Ann. Stats., secs. 3901 and 3902; *Sayre v. Sage,* 47 Colo. 559, 108 Pac. 160; *Dunlap v. Henry,* 76 Mo. 106; *Leftwich v. City of Richmond,* 100 Va. 164, 40 S. E. 65; and *Jackson et al. v. Neal,* 136 Ind. 173, 35 N. E. 1021." (Italics are mine.)

Revised Statutes, 1899, sec. 1897, of Wyoming, provide that tax deeds shall be acknowledged by the county treasurer before the clerk of a District Court. In the case of *Matthews v. Blake,* 16 Wyo. 116, 92 Pac. 242, 243, a tax deed was offered in evidence, the acknowledgment of which was taken before a notary public, and the Supreme Court held the deed void upon its face, because not acknowledged before the proper officer, and that the same did not constitute even a color of title. The court said, in part:

"Where the statute directs the execution of a deed by a public officer, and requires it to be executed in a particular manner and to be witnessed or acknowledged before a particular officer, the witnessing or acknowledging of the deed in that manner is a part of its execution, and without such witnessing or acknowledgment is void upon its face. The rule is stated in Black on Tax Titles, sec. 208 (1st Ed., sec. 392, 2nd Ed.), as follows: 'A rule of primary importance is that the execution of a tax deed must conform strictly to the statute; that is, any directions which the law may give in regard to its signature, seal, witnesses or acknowledgment must be duly complied with, or the conveyance will be invalidated. Thus, if the act requires the tax deeds shall be authenticated by the addition of the seal of the county, and this be omitted, the deed will be void; *nor will it even be admissible to show color of title under the special limitation of the revenue act.*'" (Italics are ours.)

We think the ruling of the trial court, in excluding the unacknowledged tax deed tendered in evidence as color of

title, was in harmony with the decisions of the Supreme Court of this state and other authorities herein cited; hence, the judgment is affirmed.

Affirmed.

[No. 4033.]

ABERNETHY ET AL. V. WRIGHT.

1. CONTRACTS—*Illegal.* No recovery can be had between the original parties upon a promissory note given as part of a scheme to defraud the creditors of the payee. (244.)

2. MAXIMS—*Potior est conditio defendentis.* The law will not lend its aid to either of the parties to an executory contract, the purpose of which was to defraud a third. (245.)

Error to Boulder District Court. HON HARRY P. GAMBLE, Judge.

Messrs. MILLER, BARND & WILLIAMS, for plaintiffs in error.

Messrs. S. H. THOMPSON, JR., THOMAS, BRYANT, NYE & MALBURN, for defendant in error.

BELL, J.

This action was commenced in the Boulder County District Court May 21st, 1910, upon a promissory note for $2,500, dated March 29th, 1909, payable one year after date, with interest at 8 per cent. per annum, to the order of Robert B. Wright, defendant in error, plaintiff below, hereinafter called plaintiff, and signed by Tom Abernethy, Jr., and Henry Peltier, plaintiffs in error, defendants below, hereinafter called defendants.

Amended separate answers were filed, denying the material allegations of the complaint, and for a second further defense, each of the defendants alleged that the consideration for the note was illegal; that plaintiff induced them to sign the note for the purpose of defrauding his creditors, and agreed to and did transfer to them a house and lot in Lafayette, Colo., for the purpose of avoiding the levy of executions thereon in actions then pending in the District and County Courts of Boulder County, wherein he was defendant and intervenor; that said transfer was made and the note executed so that plaintiff could show a consideration in law for said transfer, should it become necessary, or should said transfer be attacked by creditors; that said transfer was intended to be but temporary, and it was understood that the property was to be reconveyed, and the note cancelled, when the pending litigation was disposed of; that plaintiff agreed in writing with defendants that said note should never be collected from them or either of them, and that he should protect them against any damage or injury by reason of said transfer; that the note in question was without consideration and wholly void; and that defendants tendered in said answers a deed, executed and acknowledged, conveying whatever interest they may have had, of record or otherwise, in the property transferred to them.

Demurrers were filed to said amended separate answers, and overruled as to the first defenses, and sustained as to the second ones; defendants elected to stand by the second defenses as pleaded; the cause was tried to the court without a jury, and resulted in a judgment for the plaintiff in accordance with the prayer of the complaint.

The ruling of the trial court in sustaining the demurrers to said second defenses is among the errors assigned.

The courts are divided in allowing defendants *in pari delicto* to defend upon the ground of the illegality of their transactions when they are in undisturbed possession of the

property; but the better reasoned cases seem to support the admissibility of such defenses. In 14 Am. and Eng. Encyc. of Law, 2nd Ed., 277, it is said:

"In those courts which have decided this question in the affirmative, it has been said that to hold otherwise would produce the strange and unnecessary anomaly, that while the promises in a contract founded upon the illegal considerations of compounding a felony, gaming, usury, restraining trade, restraining marriage, and the like, cannot enforce it, he may do so if the consideration is that of a most gross and outrageous attempt to cheat and defraud creditors."

Bump on Fraudulent Conveyances, 4th Ed., page 457, sec. 444, holds that:

"The principles upon which a specific performance of an agreement to reconvey is refused apply also to an action at law upon such an agreement, *or upon a note given as the consideration for a fraudulent transfer.* There is a marked and settled distinction between executory and executed contracts of a fraudulent character. Whatever the parties to an action have executed for fraudulent purposes, the law refuses to compel the contractor to execute or to pay damages for not executing. In both cases it leaves the parties where it finds them." (Italics are mine.)

Among the very many cases cited to the proposition, both in Bump on Fraudulent Conveyances and in 14 Am. and Eng. Encyc., *supra,* is that of *Nellis v. Clark,* 4 Hill (N. Y.), 424, 20 Wend. 24, which is one of the earliest American discussions and dispositions of the question, and has since been consistently recognied and adhered to in a number of the states of the Union. There, as in the instant case, action was instituted upon a promissory note given as a part consideration for the transfer of a realty. At the trial defendant therein offered to prove, among other things, that the conveyance was fraudulent, and made for the purpose of avoiding the levy of an execution on the property conveyed, in an action for slander then pending against the

grantor. The evidence was objected to by the plaintiff in the action, who insisted that it was not competent for the defendant to allege his own fraud in exoneration of his liability. The objection was sustained, and upon review, Cowen, J., speaking for the Supreme Court of the State of New York, said:

"We are called upon to help Buttolph recover a sum of money which he openly declares is due to him as the wages of iniquity, the consideration of a fraudulent sale of his land in pursuance of a conspiracy between him and the defendant to defraud Otis and others; an offence indictable as such at common law under most circumstances, * * * and since made so by statute, without the ingredient of conspiracy.

"Why the law should single out the fraudulent debtor, and make him the special object of its favor, we have not been informed upon any authority, and I think we shall see that we have an abundance of authority which will warrant us in holding, that so long as the fraudulent contract is *unexecuted*, the principles cited will apply with all their force as well to this sort of unlawful dealing as to any other."

After comparing a number of cases, and discussing the effect of the statute 27 Elizabeth in the matter, he proceeds as follows:

"It seems to me, then, that we cannot mistake, in saying we are bound to look at the question before us precisely as if there were no statute on the subject. What conceivable difference, in principle, is there between the cases already cited and the one at bar? What difference between all that numerous class of contracts, such as bonds or notes given under arrangements to defraud third persons, creditors or others, which have been declared void at the common law, and the note before us? Marriage brokerage contracts are a familiar instance, because they tend to work a fraud as against a third party who is to be drawn into the

marriage. * * * Secret agreements for preference under deeds of composition * * * or in consideration of withdrawing opposition to the discharge of an insolvent, * * * or of puffing at an auction, * * * are void as being, in the first cases, fraudulent against creditors, and in the latter against bidders; and the party sued on such and like contracts may give the fraud in evidence to show that it is a case in which the law ought not to move. In *Holman v. Johnson* (Cowp. 343), Lord Mansfield said: 'The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man upon an immoral or an illegal act. If, from the plaintiff's stating otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*' These remarks cover the whole ground on which Clark, the defendant, stands, as I attempted to show in the outset; neither he nor Buttolph have any positive remedy on their own account. But as the law finds them, so it will leave them. They derive that kind of negative assistance which arises from their cases being mutually such that the law will not tarnish its hands by rescuing them from the mire."

Wait on Fraudulent Conveyances and Creditors' Bills, 3rd Ed., page 720, sec. 396, quotes at length, with approval, from *Church v. Muir*, 33 N. J. Law, 319, to the effect that a note which is given for property transferred to the maker for the purpose of defrauding the creditors of the payee cannot be enforced in the hands of the payee against the maker; and many other authorities to the same effect, too numerous to mention, can be found from other states. An extended note to *Whitworth v. Thomas*, 3 Am. St. Rep., 725-745, most thoroughly discusses the subject, and in conclusion, pages 739-740, reads as follows:

"Whether such executory contracts are held to be valid or a nullity, the conclusion that they can be enforced is certainly not a logical one, or at least not one founded on legal or equitable principles, because, as in the particular instance of enforcing the collection of notes given in the payment of land or personal property so fraudulently transferred, the court thereby simply enables the fraudulent grantor or vendor to reap the fruits of his covinous transaction by collecting the proceeds of such sale, grant or transfer. The following cases, therefore, which hold that such executory contract cannot be enforced seem more consistent with all law and equity:" citing a long list of cases from Missouri, New York, Alabama, Ohio, and other states.

Nor is the question without authority from our own state. In *Branham v. Stallings*, 21 Colo. 211-216, 40 Pac. 396, 52 Am. St. 213, our Supreme Court, after citing, among others, *Nellis v. Clark, supra*, quotes, with approval, from *Norris v. Norris' Admr.*, 9 Dana's Ky. Reps. 317, 35 Am. Dec. 138, as follows:

"'When the parties to an illegal or fraudulent contract are *in pari delicto*, neither a court of equity nor a court of law will aid either of them in enforcing the execution of that which may be executory, or in revoking or rescinding that which may have been executed. In such a case, the law will not be the instrument of its own subversion, and, to

every invocation of its assistance, replies, *'In pari delicto potior est conditio defendentis.'* "

This quotation is also made with approval in *McConnell v. Schultz,* 23 Colo. App. 194, 199, 128 Pac. 876, and in *Houston v. Walton,* 23 Colo. App. 282, 294, 129 Pac. 263, 267, King, J., speaking for the court, makes use of the following language:

" 'No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa,* or from the transgression of a positive law of this country, there the court says he has no right to be assisted.' Wharton's Legal Maxims, p. 81; *Martin v. Hodge,* 47 Ark. 378, 384." [1 S. W. 694, 58 Am. Rep. 763.]

We think the trial court erred in sustaining the demurrers to the second further defenses, and, therefore, the judgment is reversed and the case remanded for further proceedings.

Reversed and remanded.

[No. 4056.]

FRATERNAL AID ASSOCIATION V. COLLIER.

1. EVIDENCE—*Measure of Proof.* The plaintiff must produce a fair preponderance of evidence upon every question of fact involved in the issues. (247.)

2. NEW TRIAL—*Several Verdicts.* There was a seeming conflict in the evidence, and there appeared to have been three trials at *nisi prius.* The court declined to disturb the judgment. (247.)

Error Denver District Court. HON. JAMES H. TELLER, Judge.

Mr. F. S. TESCH, for plaintiff in error.

No appearance for defendant in error.

KING, J., delivered the opinion of the court.

The Fraternal Aid Association sued Clara E. Collier to recover the sum of $1,000 which it had paid to her as the beneficiary named in a benefit certificate issued to her mother, Bertha Wolff. Plaintiff's right to recover is based on a complaint which alleges that in the application for membership, said Wolff falsely represented that she was born November 25, 1850, whereas, in fact, she was born December 26, 1834, and that the same false statement as to the age of the insured was made by the defendant in her proof of death upon which she obtained payment of the policy or certificate.

To sustain the cause of action, plaintiff introduced duly authenticated certificates from records showing that Marie Louise Bertha Lebuser was born at Frankfort-on-the-Oder, November 25, 1833, and was married to Johann Heinrich Wolff, the tailor, October 13, 1861, at Berlin; and the certificate by the president of the Royal Prussian Police that Bertha Lebuser, born December 26, 1861, married October 13, 1861, to Henry August Wolff, the tailor, was reported as having gone to America with her husband and two children of said marriage in the year 1869. Depositions were introduced tending to show that the Bertha Lebuser named in the said records was the identical Bertha Wolff, the insured. Defendant testified that Bertha Wolff, the insured, was her mother; that her father's name was Stratton; that she was born in 1867 at Vicksburg, Mississippi; that her stepfather's name was Henry Wolff, and her mother's maiden name was Bertha Lois Lebuse.

Sufficient has been stated to indicate that defendant's testimony tended to raise a question, perhaps a doubt, as to whether the person whose birth and marriage is certified to as aforesaid is the same person named in the benefit cer-

tificate. It was incumbent on the plaintiff to satisfy the jury on that question by a fair preponderance of the evidence. In consideration of what may be regarded as a conflict in the evidence, and in view of certain matters in the record from which we infer that the cause has been three times tried at *nisi prius*, we feel constrained to let the judgment stand.

For the reasons given, the judgment is affirmed.

Affirmed.

[No. 4085.]

JENKINS v. GOLD DOLLAR MINING AND MILLING COMPANY.

1. EXECUTION SALE—*Redemption.* In the absence of a statute neither the debtor, his grantee, nor his creditor, is entitled to redeem from an execution sale of land. (249.)

2. —— *Mortgagee's Right.* A mortgagee of lands may discharge a judgment which is senior to his mortgage, and be subrogated in equity to the right of the judgment creditor.

If entitled to redeem from a sale of the lands under such prior judgment, which is not decided, he must not delay until a junior judgment creditor, by redemption, and a sale pursuant thereto, has succeeded to the rights of the creditor in the senior judgment (Rev. Stat., 3653, 3654). (249.)

3. —— *Sheriff's Deed, upon redemption sale,* made by a judgment creditor, relates to the lien of the prior judgment, and supersedes an intervening mortgage. (250.)

The court recommends an amendment to the statute, to the effect that all liens upon real estate shall be paid according to their priority of record. (251.)

Error to Gilpin District Court. HON. CHAS MCCALL, Judge.

Mr. W. C. FULLERTON and Mr. CHASE WITHROW, for plaintiff in error.

Mr. JAMES M. SERIGHT, for defendants in error.

MORGAN, J.

Writ of error by plaintiff in the lower court, who brought a suit to foreclose a mortgage on real property, and to set aside a sheriff's deed obtained by the defendants, a partnership, and judgment creditors of the mortgagor. A general demurrer was sustained to the plaintiff's second amended complaint, and, as he elected to stand upon it, judgment was entered against him.

The complaint alleged the following pertinent facts: the giving and recording of the mortgage, and the default; that prior to and at the time of the giving of the mortgage, a judgment lien existed of record against the mortgagor, and after the mortgage was made and recorded, execution was issued on said judgment, the property was levied upon and sold, and a sheriff's certificate of purchase was issued; that prior to the expiration of the six months given by statute (Sec. 3652, R. S. 1908), for the judgment debtor, "his heirs, executors, administrators, or grantees," to redeem from said sale, no effort was made to redeem, nor at any time thereafter, by the debtor or the mortgagee; that within the next three months, given by statute (Sec. 2653, R. S. 1908), "for any judgment creditor to redeem," the partnership defendants herein, having obtained a judgment against the mortgagor, debtor, subsequent to the making and recording of the mortgage, redeemed the property from said sale, as provided by said secs. 3653 and 3654, R. S. 1908, and the property was sold again, by virtue of the execution issued and levied under the subsequent judgment; the said partnership defendants bid "the amount paid to redeem, only," and received a sheriff's deed "forthwith," as provided by said sec. 3654.

The point raised by the demurrer and relied upon here, is, that the mortgagee, the same as the debtor, mortgagor, lost his rights under the mortgage, by failing to redeem at any time, or to make any offer to do so; and that the sher-

iff's deed relates back to the lien of the senior judgment, and that the redeeming creditor is entitled to the rights of the purchaser from whom the property was redeemed, and that the deed is, therefore, paramount to the mortgage.

It is unnecessary to quote or to discuss all of our recording and redemption acts in order to decide this question; it is sufficient to say that, without the statutes of redemption, neither judgment debtors nor judgment creditors, nor grantees of the judgment debtor, taking his title, could redeem from an execution sale. *Paddack v. Staley*, 13 Colo. App. 363, 369, 58 Pac. 363; Freeman on Executions (3rd Ed.), Sec. 321. This rule, however, in reference to the right to redeem, would not prevent a mortgagee from paying off a prior judgment and being subrogated in equity to the rights thereunder for his protection; but, on account of the redemption statute, he must not delay, as in this case, and permit an execution sale to be made under such prior judgment, and suffer the time to arrive when subsequent judgment creditors may redeem from said sale, under the statute, and thereby to become entitled to the rights of the purchaser at said sale, and to take a sheriff's deed that relates back to the lien of the prior judgment, and, thereby, become superior to the mortgage. It is not necessary to decide whether a mortgagee has a right under the statute to redeem, as no offer nor attempt was made to redeem. However, it has been held in Illinois, in 1871, construing the statute in effect at that time, and from which, it appears our statute was taken, that a mortgagee is a grantee, within the meaning of the statute. *Seligman v. Laubheimer*, 58 Ill., 124, 125. A contrary view, however, is expressed in New York. *Van Rensselaer v. The Sheriff, infra.* And it has been held in many cases in Illinois, including those hereinafter cited, that the statute providing a limited time for judgment debtors and their grantees to redeem, operates as a statute of limitation, and, unless they redeem within the time limited. their rights are lost. The

same has been held in this state. *Roose v. Gove. infra.*

In the case of *Roose v. Gove,* 32 Colo. 522, 526, 77 Pac. 246, relied upon by counsel, the Supreme Court held that a judgment debtor and his grantees lost their rights, by failing to redeem within the six months; and held, also, that a redemption, by a junior judgment creditor, "operates to transfer to the creditor redeeming, the rights of the creditor from whom he redeems." *Finch v. Turner,* 21 Colo. 287, 40 Pac. 565. And the Supreme Court of Illinois, in a long line of decisions has so construed a statute of that state from which, it appears, our statute was taken. *Sweezy v. Chandler,* 11 Ill. 445; *Stone v. Gardner,* 20 Ill. 304, 71 Am. Dec. 268; *Blair v. Chamberlin,* 39 Ill. 523, 89 Am. Dec. 322; *Smith v. Mace,* 137 Ill. 68, 73, 26 N. E. 1092. In the case last cited the court said:

"A title acquired at an execution sale upon redemption by a junior judgment creditor relates back to the judgment from which the redemption is made, and is paramount to any title acquired subsequent to the beginning of the lien of that judgment. The junior judgment may not, itself, have been a lien upon the property redeemed,—it is the lien of the senior judgment that is enforced."

The same construction has been announced in other states: *Van Rensselaer v. The Sheriff,* 1 Cowen (N. Y.) 32, 501; *Rush v. Mitchell,* 71 Ia. 333, 32 N. W. 367.

Our Supreme Court and the former Court of Appeals have clearly indicated an intention to follow the Illinois decisions and to place the same construction upon our statute. *Floyd v. Sellars,* 7 Colo. App. 498, 44 Pac. 373; *Sellars v. Floyd,* 24 Colo. 484, 52 Pac. 674; *Roose v. Gove, supra; Paddack v. Staley, supra; Finch v. Turner, supra.*

Nothing herein shall be construed as preventing the plaintiff from foreclosing the mortgage upon the property covered by it to secure the purchase price thereof, which property it appears was not sold at any of the execution sales.

The writer of this opinion feels constrained to recommend to the law making power of the state an amendment to our redemption statute, to the effect that all liens on real estate should be paid according to their priority of record, so that there may be no real or apparent conflict between the recording acts and the redemption statutes. As they now stand, courts can do no more nor less than enforce them. And, to avoid uncertainty, the Legislature should, by amendment, insert the words—mortgagees, and "any person interested in the premises through or under" the judgment debtor, as the Legislature of Illinois did, in 1872, after this state adopted the statute of that state. And the Legislature could, also, consider the suggestion of the late Judge Bissell in the case of *Paddack v. Staley, supra;* or follow the Legislature of Illinois, by giving to each judgment creditor a limited time (two days in Illinois), in which to exercise the right to redeem, in the order of their priority. Sec. 24, Ch. 77, Starr and Curtis' Am. St. Ill.

Judge Bissell said, referring to the redemption act, in *Paddock v. Staley, supra*:

"This is the condition of our redemption statute. It is an unfortunate piece of legislation which loudly calls for legislative correction. The courts are impotent to aid creditors and only the law making power may furnish a remedy. Many states provide that subsequent creditors shall have the right to redeem according to their priority and within dates and times named in the act, so that each judgment creditor may exercise and preserve his lien and his claim not by excessive diligence and redemption in the midnight hour, but within specific limits. Manifestly this would be right and proper. But there is no such provision in our statute. Any judgment creditor may redeem within the time specified; he may be, the first, the second, the fifth, or one who has come into the vineyard at the eleventh hour and he will receive as much benefit from the statute as though he had been originally hired."

Judgment affirmed.

Decided April 12th, A. D. 1915. Rehearing denied June 15, A. D. 1915.

[No. 4089.]

BEAVER CREEK SCHOOL LAND DITCH COMPANY V. ELLING.

1. INSTRUCTIONS—*In Actions Founded Upon a Statute,* an instuction is generally proper if it fairly follows the language of the statute, *e. g.,* in an action under Rev. Stat., Secs. 3233, 3238, for an injury to plaintiff's premises by seepage from defendant's ditch, attributed to negligence in the construction, maintenance and operation thereof, an instruction that defendant was "under duty to keep its ditch in good condition, maintain its embankments in good repair, and prevent water wasting therefrom," was approved. (254.)

2. SEEPAGE—*Injuries From—Evidence.* Action for an injury to plaintiff's premises alleged to have been occasioned by seepage from defendant's ditch. Evidence held sufficient to sustain a recovery by plaintiff. (255-257.)

Error to Morgan District Court. HON. H. P. BURKE, Judge.

Messrs. STEPHENSON & STEPHENSON, for plaintiff in error.

Messrs. VAN BRADT & VAN BRADT, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

This action was begun August 2, 1909, by plaintiff Elling, defendant in error, against defendant, The Beaver Creek School Land Ditch Company. We will speak of the parties herein as plaintiff and defendant, as they appear in the original complaint.

The action is principally to recover damages for injury done to plaintiff's brick yard, garden and cellar, by reason of seepage from defendant's ditch. It is claimed in the complaint that, by reason of the negligence and carelessness of defendant in maintaining its ditch, the waters therefrom were permitted to seep into plaintiff's cellar, and into the pit from which he was extracting clay for brick making purposes; that by reason thereof he was compelled to cease work for a time, and was put to the cost and expense of removing the seepage water from the cellar and working pit. It is further averred that defendant had constructed its ditch and the banks thereof in a careless and negligent manner, and in such a way as to be unsuited and insufficient for the uses and purposes for which it was constructed, and had failed and neglected to keep and maintain the ditch and its banks in proper repair for such purposes; that on or about July 1, 1909, while the ditch was in a defective condition, defendant premitted The Great Western Sugar Company, one of its water consumers, to place an obstruction called a "ditch check" in the ditch, some distance below plaintiff's land, which prevented and hindered the natural flow of the water in the ditch, causing a back-flow therein, until it reached a point opposite plaintiff's premises, thereby causing the seepage aforesaid.

Defendant's answer formed issues upon the allegations of the complaint.

From reading the briefs we infer that the decisive issues presented for our consideration are those relating to the validity of certain instructions given, and the sufficiency of the evidence to support the verdict.

Objection is made by defendant that instruction numger five is erroneous, for the reason that it fails to state that a ditch owner is only held to ordinary care in the operation, construction or management of the ditch, and is not liable unles he fails to exercise such care. The instruction reads as follows:

"Under the law of this case it was a duty incumbent upon the defendant company to keep its ditch in good condition, maintain its embankments, keep them in good repair, and prevent water wasting therefrom."

Objection is also made to instruction number six, which instructs the jury in substance that if defendant's ditch was carelessly or negligently constructed, managed or operated, so as to cause seepage and damage to plaintiff's property, defendant would be liable, etc. These two instructions are evidently founded upon sections 3233 and 3238, Revised Statutes, Colorado, 1908, the former reading in part as follows:

"The owner or owners of any ditch for irrigation, or other purposes, shall carefully maintain the embankments thereof, so that the waters of such ditch may not flood or damage the premises of others."

The latter reads as follows:

"The owner of any irrigating or mill ditch shall carefully maintain and keep the embankments thereof in good repair and prevent the water from wasting."

An instruction is generally good if it fairly follows in phraseology the language of a statute that imposes a duty, for failure to perform which, liability attaches in case damage results.

The court elsewhere in the instructions told the jury that the burden of proof was upon plaintiff to establish the negligence and carelessness charged against defendant, by a preponderance of the evidence, failing in which their verdict should be for defendant; also that plaintiff could not recover for any damage done him by the operation of defendant's ditch unless such damage was due to the carelessness or negligence of defendant in its operation or construction, and such carelessness or negligence was unknown to plaintiff at the time he purchased his property, and he could not have known the same by the exercise of reasonable care and diligence; and that they could not render a verdict in

favor of plaintiff unless the damage complained of was directly caused by the carelessness or negligence of defendant in the construction, operation or management, of its ditch. If all the instructions upon this point be considered together, we think the court was warranted in giving the two to which objection is made. Objections to instructions, similar to those here urged, were made in *Greeley Irrigating Co. v. House*, 14 Colo. 549, and the court held such objections untenable.

Further objection is made by defendant to the giving of instruction number seven, upon the ground that the same is not clear, and is based upon the premise that water seeped from its ditch. By this instruction the jury was told in substance that before plaintiff could recover he must not only prove the character and amount of his damage, but also that the water which caused the same came in fact from the ditch of defendant, and that the damage was the proximate result of the operation of defendant's ditch. We see no serious objection in this instruction, if we bear in mind other instructions given. The instructions are based upon ample evidence, which tends to show that the damage claimed by plaintiff was the result of seepage from defendant's ditch; that such seepage could have been caused in no other way; that the seepage was caused by placing the "ditch check" in the ditch, which backed the water up to and opposite plaintiff's property; and further, that defendant permitted the main ditch to carry an excessive amount of water, which raised it up so as to flow on new-made embankments, which, it is claimed, were so negligently constructed as to permit of seepage through the same, causing the damage complained of.

Plaintiff's witness Baker, a civil engineer, testified substantially as follows:

"I think that water would not seep from the lateral on the south of the land into the working pit. A very small portion of the water would seep from the small lateral on

the opposite side of the Beaver Creek ditch as compared to the amount that would seep from the Beaver Creek ditch."

Plaintiff Elling testified substantially as follows:

"In July, 1909, there was more water in the Beaver Creek ditch than there had ever been before. They had put a check in the ditch down further north to check the water up. The water stood still and raised until it raised the flume at the southern part of my place. On the tenth day of the same month I had talked with the secretary of the defendant and he had gone down there and looked the place over. I notified the defendant company on July 13, 1909, by written notice. Defendant has never made any attempt to remedy the damage, and they did not make any attempt to prevent it after they had been notified. The little bench that I mentioned in the ditch is the natural surface of the ground, and above that is the dirt piled up there for the ditch bank, and as soon as the water gets up over that bench it comes through. After the water got up over the second bench in the ditch it went down into the ground and came out in the pit five feet below the surface."

Bollinger, plaintiff's witness, testified in substance as follows:

"I was on plaintiff's property July 13, 1909. I saw the water running through, and judged that it was seepage. The water seemed to be coming out of the bottom of the pit. It seemed to be moist up two or three feet. The Beaver Creek ditch was pretty full, caused by the check in the ditch. It was running over its banks on some prairie between the check and the south line of Elling's property. When I was there Mr. Elling was not working on account of the seepage. The laterals that drew the water out of the main ditch were very weedy."

Plaintiff's witness Nelson testified substantially as folows:

"I was at plaintiff's property on July 13th, and observed that part of his property was being seeped or flooded

with water, the part that he used as a pit. It was so wet in there that he could not make brick. The water in the Beaver Creek ditch was checked up until it came up over the natural bank and into the made bank."

Other evidence of like import is found in the record.

The argument in the brief of plaintiff in error is largely predicated upon the theory that there was not sufficient evidence to establish the allegations of plaintiff's complaint concerning the seepage of water from defendant's ditch into plaintiff's premises, or to establish carelessness or negligence of defendant in the operation, maintenance or construction of its ditch. These issues of fact were submitted to the jury for their determination, and the instructions as a whole were noticeably fair to defendant. Many witnesses were sworn at the trial (none thereof being impeached), and the jury had the advantage of observing their manner and deportment in giving their testimony, as well as evidence of partiality (if any existed), for or against either of the parties. They also made a personal inspection of the premises alleged to have been damaged, and, after deliberation, returned a verdict of $157.00 in favor of plaintiff. In addition to this, the trial court, after listening to counsel upon the motion for new trial, and after considering the affidavits offered in support thereof, apparently discovered no ground for setting aside the verdict. Failing to find any reversible error in the proceedings below, we conclude the judgment should be affirmed.

Affirmed.

[No. 4094.]

CONTINENTAL TRUST CO. v. KNIGHT.

EQUITY PRACTICE—*Jury.* In causes in equity the court may direct a verdict, even where the evidence is conflicting; or may discharge the jury, and decree upon its own findings. Its authority is unquestionable.

Error to Denver District Court. HON. JAMES H. TELLER, Judge.

Mr. WILLIAM H. DICKSON, for plaintiff in error.

Messrs. CRUMP & ALLEN, for defendant in error.

MORGAN, J.

Error to reverse a judgment in an equity case on a directed verdict for the plaintiff upon the evidence of both sides and the subsequent findings of fact by the court.

The suit was brought to cancel an endorsement of plaintiff on a note for $5000, and to recover $250 that had been paid by the plaintiff, as he alleged, through the mistaken belief that money had been loaned on the note to the makers thereof, when, in fact, no money had been ever loaned on it, but, without authority from the plaintiff, it had been and was held by the defendant trust company as collateral security upon a note of third parties. Whether the note was ever actually negotiated was here a question of fact, which the court determined against the plaintiff in error.

The action was for equitable relief, and therefore the court could direct a verdict even if the evidence was conflicting, and enter judgment, as was done in this instance, upon its own findings. Sec. 173, Civil Code; *Abbott v. Monti*, 3 Colo. 561; *Kellogg v. Kellogg*, 21 Colo. 181, 183, 40 Pac. 358; *Cree v. Lewis*, 49 Colo. 186, 112 Pac. 326; *Weiss v. Ahrens*, 24 Colo. App. 531, 536, 135 Pac. 987.

It is clear, also, from defendant's evidence, that no money was ever loaned or advanced on the note for $5000, and that no authority was ever given, binding upon plaintiff, to use the note as collateral, unless by ratification at the time he paid the $250; but, again, such ratification depends upon the right of the lower court itself to deter-

mine the matter on the conflict of testimony. As heretofore stated, where the action is for equitable relief, this right is unquestionable, even though a money demand be also involved in the same action. See foregoing citations.

Other errors assigned have been carefully examined and no reason found for reversing the judgment of the lower court, which is hereby affirmed.

Affirmed.

[No. 4117.]

SELKREGG ET AL. V. THOMAS.

1. EXECUTORS AND ADMINISTRATORS—*What Actions Survive.* An action to recover money obtained by a decedent, by means of false representations, is *ex contractu*, and survives against his personal representative. (260.)

2. DISTRICT COURT—*Jurisdiction.* No statute assumes to deprive the District Court of its jurisdiction over actions against the personal representative for a deceit practiced by the decedent in his life-time. The repeal of Gen. Stat., secs. 3671, 3618, had not this effect. (261.)

3. WITNESS—*Competency.* One who is not a party to an action against an executor is not disqualified as a witness for the plaintiff by the mere fact that he may be, himself, relieved of liability by a judgment against the executor. He is not "directly interested," within the meaning of the statute. (Rev. Stat., sec. 7267.) (261.)

4. PLEADINGS—*Construed.* Averment that the defendant's testator "received to the use of the plaintiff" a sum of money mentioned, suffices to admit testimony that the moneys were obtained by false and fraudulent representations. (261.)

5. APPEALS AND ERROR—*Variance—Techinacl Defects.* Under the act of 1911 (Laws 1911, c. 6, sec. 20), generality and indefiniteness of averment, not objected to in the court below, will not warrant the reversal of a judgment otherwise unimpeachable. (262.)

6. —— *Judgment.* The judgment of the court below affirmed as to the sum awarded plaintiff, and reversed for error in not submitting to the jury his demand for an additional amount. (263.)

Error to Denver District Court.. HON JOHN H. DENISON, Judge.

Mr. L. J. STARK and Mr. GEORGE S. REDD, for plaintiffs in error.

Mr. JOHN T. BOTTOM, for defendant in error.

MORGAN, J.

Thomas sued Fernald for money had and received, alleging that he had paid $3000 to him as part payment for a three-fourths interest in an automobile business, the principal value of which was a selling agency for a certain automobile, and that the purchase could not be carried out on account of Fernald's failure and refusal to secure the continuation and transfer of such agency contract, which Fernald had with the manufacturers; alleging, also, that Fernald fraudulently represented that such contract of agency was good for one year, while, in fact, the contract provided that it could be canceled by the manufacturers on two weeks notice. Fernald died before the trial and his executors were substituted, and judgment on a verdict for $1000 was entered against them, the court instructing the jury that the plaintiff could not recover $2000 of the amount claimed. Plaintiff brings error, and the defendants assign cross-errors.

The contention of the plaintiffs in error, that the cause of action stated in the complaint did not survive the death of Fernald, and could not be maintained against his executors, is without merit; because an action for money had and received, although obtained through fraudulent misrepresentations by the seller and as part payment on a sale of property that is not completed on account of such fraud on the part of the seller, survives the death of the seller; the action is, nevertheles, *ex contractu*, against the seller and his esate, which has been enriched by the receipt of the money. The action does not come within that class of actions that do not survive. Sec. 7258, Rev. St. 1908;

Ryer v. Blaisdell, 26 Colo. App. 387, 143 Pac. 385.

It is also contended that the court was without jurisdiction because the claim was not first presented to the probate court for allowance against the estate. This contention is without merit, because there is nothing in the present statute of wills, or elsewhere, that divests the District Courts of their constitutional jurisdiction of such matter as the one in controversy; furthermore, the executors were duly substituted, and they answered and entered into the trial, and the court proceeded to a judgment without objection on their part, on such ground. *Brown's Estate v. Stair,* 25 Colo. App. 140, 146, 136 Pac. 1003 Although the act of 1905 repealed secs. 3617 and 3618 of the General Statutes of 1883, which provided that "creditors who may bring their actions in the district court," and file a "transcript of the record of judgment entered," in the county court, shall have their judgments "classed and paid as other demands;" such repeal did not divest the District Courts of their constitutional jurisdiction, but only repealed a statutory right that existed without the statute. *Tucker v. Tucker,* 21 Colo. App. 94, 98, 121 Pac. 125.

It is contended that the action, before the amendment of the complaint, was *ex delicto,* for fraud and deceit, and that the amendment changed it to an action *ex contractu,* but the complaint, even without the amendment, is not so construed. A complaint states a cause of action *ex contractu,* for "money had and received," even though the allegations are that the money was obtained through fraud and deceit. *Ryer v. Blaisdell, supra; Jameison House Furn. Co. v. Brainard,* 16 Colo. App. 509, 66 Pac. 775.

It is also contended that the witness Clark was directly interested in the event of the suit and was not a competent witness because of his interest under sec. 7267, Rev. St. 1908. It is not believed that the witness was "directly interested" within the meaning of that statute. In order that a witness should be barred from testifying under that

statute he should be clearly within the exception, 40 Cyc. 2260, 2262, 2280. The mere fact that he might be relieved from liability himself, by a judgment against another, where he is not a party to the suit, and is not testifying of his own motion, is not sufficient to bring him within the exception provided in that statute. *King Shoe Co. v. Chittenden,* 16 Colo. App. 441, 66 Pac. 173.

The next contention is, that the judgment, on the verdict for $1000, ought to be reversed, for the reason that such recovery was permitted by the court, by instructcion No. 2, involving a submission to the jury of a state of facts and circumstances not alleged in the complaint. This instruction was to the effect that such transaction constituted a wrong perpetrated upon the plaintiff by reason of which Fernald obtained from him the $1000. It is true the facts were not specifically alleged in the complaint, but the complaint states that "on or about October 29, 1909, and Nopember 9, 1909, Fernald had and received the respective sums of $2000, and $1000, to the use of the said plaintiff, which the said Fernald had always failed and refused to pay." The allegations were sufficient under which to permit the testimony and to justify the instruction. The defendants could have required these allegations to be made more specific; they were made by amendment long bfore the trial. Even if the variance were technically true, this court ought not to reverse the judgment, for such reason, in the face of the statute which provides that "no judgment shall be reversed or affected by reason of such error or defects." Sec. 20, page 17, Sess. Laws, 1911.

Cross-error is assigned, based upon instruction No. 1, taking from the jury the right of the plaintiff to recover under the evidence the $2000, had and received on October 29, aforesaid. It is concluded this was error. The evidence tended to prove that this $2000 was wrongfully obtained and withheld. The plaintiff's witness testified that the $2000 was paid to Thomas by Fernald under the belief,

from the latter's representations, that the contract with the manufacturers was good for a year; he then testified that such contract contained a provision that it could be cancelled on two weeks notice by the manufacturers; he then testified that Thomas told Fernald that he was ready to pay the balance of the purchase price if Fernald would guarantee the continuation of said contract for a year, and that Fernald refused to do anything toward the matter, and even refused to write the manufacturers about it, or permit Thomas to do so, but there and then stated to Thomas that, "you can close the deal up now or not at all," and then put on his hat and walked out, telling the witness to get the $1000 back from Thomas, which the witness had put up on the deal. These facts made out a plain *prima facie* case, and the lower court might be directed, as requested by the plaintiff, to enter judgment for the $2000, also, were it not for the testimony of Mr. White, which ought to be made less obscure, but which indicated a waiver by Thomas of Fernald's misrepresentations; and for some farther conflict in the evidence arising from the testimony of Mr. Stark and Mr. Thomas concerning the issue as to whose fault it was that the contract of purchase was not carried out. This court is not disposed to direct a lower court to enter a judgment where there is any conflict in the evidence that might be submitted to a jury. For the reasons given the judgment will be affirmed as to the $1000, and the case reversed and remanded for further proceedings as to the $2000, in accordance with this opinion.

Judgment affirmed in part and reversed in part.

Decided April 12, A. D. 1915. Rehearing denied June 14, A. D. 1915.

[No. 4131.]

MORRSON V. MCCLUER.

1. SALE—*Change of Possession.* The provision of the statute of frauds that every sale of goods not accompanied by an actual and continued change of possession shall be presumed fraudulent as against creditors (Rev. Stat., sec. 2668), has no application, where, prior to such sale, the vendor has placed the goods in possession of a bailee, and such bailee, being informed of the sale, agrees to hold them for the purchaser. (266.)

2. CHATTEL MORTGAGE—*Invalidity Cured by Possession Taken.* A writing intended to secure an indebtedness due to a particular creditor, followed by possession, was held valid as a common law mortgage, though it named no person as mortgagee; and was awarded precedence over a subsequent mortgage executed by the same mortgagor. (267.)

As to goods of which no possession was taken held otherwise. (268.)

3. FRAUD—*Evidence to Establish,* must be clear and convincing. (269.)

4. —— *Burden of Proof,* rests upon the one charging fraud. (268.)

5. —— *Mortgagor and Mortgagee.* A mortgagee is not affected by a fraudulent purpose in the mind of the mortgagor, in which he is not participating. (269.)

6. APPEAL AND ERROR—*Evidence by Deposition—Effect.* The court of review places his own interpretation upon what is set down in depositions read in the court below, without regard to the verdict of the jury. (269.)

Error to La Plata District Court. HON. W. N. SEARCY, Judge.

Mr. CHARLES A. JOHNSON, for plaintiff in error.

Mr. O. S. GALBREATH and JOHN H. GALBREATH, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

On August 22, 1912, Fay Morrison, plaintiff in error (plaintiff below), filed her complaint in replevin against Tim J. McCluer, defendant, and sued out, in aid, a writ of replevin. Under the writ certain wagons, buggies, harness, etc., were taken from the possession of the sheriff by the coroner.

The case was tried to a jury, which returned a verdict in favor of defendant, finding the value of the property to be $550.00.

It appears from the complaint that plaintiff's cause of action is based upon a claim that she was entitled to the property under the terms of a certain chattel mortgage executed to her by one Frank Langley on the 23rd day of July, 1912, recorded the same day. The property was levied upon by the sheriff under a writ of execution, based upon a judgment recovered by The Durango Mercantile Company against said Langley on July 25, 1912.

The answer admits the execution and recording of the mortgage in question, but pleads it was neither made in good faith, nor supported by valuable or good consideration; alleging that Langley executed and delivered the same for the purpose of cheating and defrauding his creditors; that plaintiff conspired with him to do so, and obtained the mortgage for the purpose of assisting him in such fraudulent design; and that The Durango Mercantile Company is entitled to the possession of the chattels replevined, by virtue of a chattel mortgage executed April 12, 1912, by said Langley to it, duly recorded that day, and possession taken thereunder, as well as by virtue of the levy aforesaid. Plaintiff contends that said mortgage was void, as no grantee was named therein, and that possession was not taken until after her chattel mortgage was recorded.

One of the controlling questions raised by this record is: Was sufficient possession taken by the mercantile company of the property described in the mortgage of April 12th, in the latter part of June or first of July, to warrant it in holding the chattels against other creditors of Langley (mortgagor), and was it such a taking as would not militate against our statute of frauds and the law relating to chattel mortgages?

Defendant's witness Couch testified in part as follows:

"A. I got the mortgage (April 12th) from the attorney of the mercantile company, with instructoins to foreclose it. I went to Al Stevenson at the San Juan barn, and told him what I had, and pointed out to him what I wanted to foreclose on, and he showed me what belonged to him and what belonged to Langley. Then I appointed him custodian to take care of the stuff. I turned it over to him.

Q. Well did he, or not, agree to turn the stuff over to you and hold it for you?

A. He did."

It appears from the record that Stevenson was in possession of the property at the San Juan barn under contract of bailment with Langley, by the terms of which Stevenson was to use the same for profit, dividing such profits with Langley.

It is urged by plaintiff that, as against Langley's other creditors, the possession of the chattels taken by Couch from Stevenson, as above shown, was insufficient to transfer the possession thereof from Langley to the mercantile company. This contention is not tenable under the following authorities, to-wit: *Weiland v. Potter*, 8 Colo. App. 79, 44 Pac. 769; *Jones v. Mackenzie Bros. W. P. & P. Co.*, 19 Colo. App. 121, 73 Pac. 847; *Hendrie & Bolthoff Mfg. Co. v. Collins*, 13 Colo. App. 8, 8 Pac. 815; *Hendrie & Bolthoff Mfg. Co. v. Collins*, 29 Colo. 102, 67 Pac. 164. It was held in the cases just cited that our statute of frauds, requiring a sale of personal property as against creditors to be accompanied by immediate delivery and followed by actual and continued change of possession, does not apply where, prior to the sale, the vendor had placed the property in the possession of a third party as bailee. If the bailee is informed of the sale and agrees to hold the property for the purchaser, possession is thereby delivered, and the sale is not fraudulent in law as to the creditors of the vendor. Applying the facts of this case to the law as stated, it is clear that the acts and doings of Couch, the mercantile company's

agent, in taking possession of the property from Stevenson at the San Juan barn, were not affected by the statute of frauds. Couch informed Stevenson that he had the chattel mortgage from Langley to his principal, and came for the purpose of foreclosing the same for such principal. Stevenson was thus informed that Langley had conveyed the property to the mercantile company. He made no objection to recognizing the sale, and thereupon agreed that from that time on to hold hold the chattels as the custodian of the mercantile company, and to turn them over to the company at any time. Plaintiff, however, suggests that at the time Couch took possession, the debt secured by the mortgage was not due, and therefore Langley's bailee had no right to surrender possession of the property to the mortgagee company, the mortgage providing that until maturity of the debt the mortgagor was entitled to retain possession of the chattels. A sufficient answer to this contention is that at the time the mortgage debt matured, to-wit, July 12th, the mortgagee company was in the actual possession of the property through its custodian, Stevenson, and so retained the possession up to the time the Morrison mortgage was given. Had the Morrison mortgage been executed and recorded between the time Couch took possession, and the maturity of the mortgage debt, another question would be presented, upon which we express no opinion. We hold that, although the defendant's written instrument was inoperative as a chattel mortgage, under *Herr v. Denver M. & M. Co.*, 13 Colo. 406, 22 Pac. 770, 6 L. R. A. 641, yet the transaction between Langley and the mercantile company, of which the instrument was a part, shown by the evidence to have been intended by both parties as a mortgage, when coupled with the complete delivery to, and taking of possession by, the mortgagee, was sufficient as a common law chattel mortgage, as against the junior lien of plaintiff. We are of the opinion that the mortgagee company had a lawful right to retain possession of the mort-

gaged chattels located at the San Juan barn, and to subject the same, by sale, to the payment *pro tanto* of the mortgage indebtedness, and the judgment to that extent must be affirmed.

As to the chattels located at Ignacio, a most careful reading of the record fails to disclose any evidence showing that possession thereof was ever taken at any time under the mortgage of April 12th by the mercantile company. On the contrary, the record strongly tends to show that no such possession was taken. Some five or six days after the levy was made, under the judgment mentioned, on the property at the San Juan barn, Hopkins was sent by the sheriff to Ignacio to bring the chattels from that place to Durango. When he went there he had an order from the sheriff on Langley to deliver the chattels to Hopkins, which order he delivered to Langley, who thereupon, without any objection, turned the property over to Hopkins. The latter found the property in Cundiff's livery stable at Ignacio, but testifies that he obtained it from Langley. The levy, not being made thereon until after the execution and recording of the Morrison mortgage, could not affect plaintiff's rights as mortgagee, unless the record discloses sufficient evidence or circumstances warranting a verdict that the mortgage was obtained or executed with a fraudulent intent on the part of Langley, to hinder, delay or defraud, his other creditors, coupled with Morrison's participation therein, or knowledge thereof. This is the only question left for determination.

Defendant's answer clearly charged Langley with having fraudulently executed the Morrison mortgage, with the intent to defraud his creditors. It is also charged that plaintiff Morrison, prior to the execution of that mortgage, had knowledge of such fraudulent act and intent on the part of Langley, and participated therein. The burden of proof was upon the defendant to establish these charges. We find no evidence showing that plaintiff participated in,

or possessed knowledge of, any fraudulent intent on behalf of Langley in executing the mortgage, nor any evidence evincing on her part a disposition to assist Langley in any such purpose. However culpable Langley may have been, or whatever determination may have existed in his mind to defraud his creditors in the giving of that mortgage, it could not affect the rights of plaintiff Morrison thereunder, unless it be shown by a fair preponderance of the evidence that she participated in his fraudulent acts in that behalf or had knowledge thereof. We have read with care the depositions of Langley, Cooper, and the plaintiff, and find nothing therein which can be fairly said to establish the fraud charged aginst plaintiff, but much testimony that directly and circumstantially denies every element of the fraud. We are not bound by the findings of the jury as to any matters contained in the depositions, but are at liberty to place our own interpretation upon the testimony therein given. *Rittmaster v. Brisbane,* 19 Colo. 371, 35 Pac. 736; *Jackson et ux v. Allen,* 4 Colo. 263: *Stuart & Co. v. Asher,* 15 Colo. App. 403, 62 Pac. 1051; *Colorado D. G. Co. v. Dunn Co.,* 18 Colo. App. 409, 71 Pac. 887; *Talcott v. Mastin,* 20 Colo. App. 488, 79 Pac. 973. In *Lathrop v. Tracy,* 24 Colo. 382, 51 Pac. 486, 65 Am. St. Rep. 229, it was held that where the evidence given upon issues of fact is partly by depositions and partly by that submitted in open court, this fact does not abrogate, but only *pro tanto* affects the rule that the findings of the trial court upon conflicting evidence should not be disturbed. The evidence *aliunde* the depositions falls short of supporting the charges of fraud made aginst plaintiff.

If we measure the evidence contained in this record by the well recognized rule, that fraud must be established against the party charged by clear and convincing evidence, and be of such a nature as to impel the mind of a reasonable man to a conviction of the truth thereof, we think it insufficient to sustain the charge. We think the testimony

of plaintiff herself was not as clear, direct and outspoken as it might have been. It fairly germinates a doubt as to whether or not the consideration claimed by her to have been given to Langley for the mortgage was as much as she claimed; at the same time we are satisfied that the evidence, considered as a whole, establishes a substantial consideration paid by her for the mortgage. We will make no further comment upon this phase of the case, more than to say that another trial might obviate this criticism.

The judgment below will be affirmed as to such chattels described in the mortgage of April 12th as were located at the San Juan barn at the time of its execution, with instructions to the lower court to take testimony as to the value of such chattels; but as to the chattels therein described and located at Ignacio, the judgment will be reversed, and the case remanded for new trial, each party paying its own costs.

Judgment reversed, with instructions.

[No. 4133.]

POST ET AL V. LANG.

1. LANDLORD AND TENANT—*Lease Construed.* Lease of a store-room. The lessees covenanted to keep the premises in repair, and at the expiration of the lease to surrender them "in as good order and condition as when entered upon, loss by fire, inevitable accident, or ordinary wear excepted." It was further provided that if the premises should "become untenantable by reason of fire or otherwise, the rent should cease while the same were being repaired." *Held,* that the words "or otherwise" are to be taken in a limited sense, conforming to that which precedes; that the clause providing for a suspension of the rent refers only to such an injury to the premises as comes fairly within the provision relieving the tenant from the burden of repairs. (274.)

2. —— *Tenant's Right to Surrender—Waiver.* Where, under the terms of the lease, the tenant is entitled to surrender, if the premises become untenantable, he must act promptly, and vacate the premises without unnecessary delay. Failing in this, he waives his right. (276.)

The tenants quit the premises, before the expiration of the term, alleging their untenantable condition, and invoking a provision of the lease which they claimed entitled them to surrender. But it appeared that after the injury to which they attributed the untenantable condition they made repairs, and continued in occupancy for more than three months, conducting their business as before, and manifesting no intention to surrender. They then began to remove, and continued moving for several weeks, during all this time voluntarily paying the rent, as it matured. *Held*, they had waived their right to surrender. (278.)

2. TRIAL—*Discharging Jury.* Where it is manifest from the evidence that the defendant entirely fails in his defense the court may discharge the jury and itself find the facts. (271, 278.)

Error to Denver District Court. HON. H. P. BURKE, Judge.

MR. JOHN C. MURRAY, MR. HIRAM D. INGERSOLL, MR. H. WENDELL STEPHENS, for plaintiffs in error.

MR. H. E. LUTHE, MR. CHARLES R. BELL, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

Suit begun January 16, 1913, by filing complaint on behalf of plaintiff (defendant in error) against defendants (plaintiffs in error), thereby seeking to recover for two month's rent, at the rate of $210 per month. In this opinion we will refer to the parties as plaintiff and defendants as they appear in the original complaint.

At the close of the trial the court took the case from the jury and rendered judgment in favor of plaintiff for the full amount claimed, to which ruling exceptions were taken, and the case removed to the Supreme Court by writ of error. By proper proceedings the case is before us for determination.

The action grows out of a written lease entered into between plaintiff and defendants on April 1, 1911. The lease was for three years, and among other covenants contained the following:

"(Lessees) to keep all the improvements upon said premises * * * in good order and repair, and at the expiration of this lease to surrender and deliver up the premises * * * in as good order and condition as when the same were entered upon, loss by fire, inevitable accident or ordinary wear excepted; * * * In case said premises shall become untentable by reason of fire or otherwise, the rents shall cease while the same are being repaired, but nothing herein contained shall be construed so as to compel the lessor to rebuild or repair said premises in case of destruction unless he so desires."

It is earnestly contended that grievous and fatal error was committed by the court in taking the case from the jury. Defendants also urge that the words "or otherwise," found in the paragraph quoted, must be construed as relieving them from the payment of rent under the lease, if it appears from the evidence that the premises became untenantable from any cause whatever, whether by fire, water or other agency. Plaintiff, on the other hand, contends that the phrase "or otherwise" must be given an *ejusdem generis* interpretation, and construed as referring only to a kindred casualty to that previously enumerated, to wit, fire, and that before defendants can be relieved from the payment of rent it must be shown that the untenantability of the premises was caused exclusively by fire, or some sudden catastrophe or event, equivalent in its nature to an act of God, but in no event could defendants escape liability for the payment of rent reserved, longer than the time consumed in making repairs, whatever be the cause of the damage.

Our Supreme Court, in the case of *Lewis v. Hughes*, 12 Colo., 208, 20 Pac., 621, has construed a lease containing a clause identical with the one we are now considering, with the exception that in that case the rent was to cease while the premises were being "rebuilt," while in the case at bar the term "repaired" is used in lieu of "rebuilt." The court found that if the premises were rendered untentable, they

were only rendered so by reason of fire and smoke destroying the scenery and furnishings therein contained, and reached the conclusion that such facts did not bring the case within the terms of the lease relating to suspension of rent, and held the tenant liable. The court said, in part:

"We think the clause relating to the suspension of rent refers to such injury to the premises as cannot be required (evidently meaning repaired), but necessitates a rebuilding of the premises; and when we consider the covenants on the part of the lessees to repair, with the provision relating to the suspension of rent, it seems evident that such provision was intended solely to relieve the lessees from their common law liability to pay rent in case of the destruction of the leased premises by fire. There is no evidence tending to show a loss or destruction of the premises, or such an injury thereto as would warrant the jury in finding as a fact that the same could not be repaired, but, to be made tenantable, must be rebuilt. The evidence shows conclusively that if the premises were rendered untenantable by the fire, it was on account of the injury to the scenery and the furnishings, and from the effect of the smoke and water in rendering the occupancy of the premises unpleasant; and we do not think such evidence brings the case within the terms of the lease relating to the suspension of the rent."

This case is cited in Underhill on Landlord and Tenant, vol. 2, sec. 792, in support of the following statement made by the author, to wit:

"A provision in a lease that rent shall cease if the premises are destroyed, or that rent shall cease if they shall become untenantable by fire, means a substantial destruction and a permanently untenantable condition, rendering further occupancy impossible, and necessitating not merely repairs, but rebuilding. Mere damage by smoke or water, rendering the occupation of the tenant unpleasant and inconvenient, is not sufficient to bring the case under the stipulation."

It will be observed in the *Lewis* case that the construction of the lease was affected to a considerable extent by the word "rebuilt," which of itself necessarily implied a total destruction, or such destruction as would require rebuilding. The word "repaired," in the lease before us, does not necessarily imply destruction *in toto*, but only such damage to the building as would necessitate repairs to the extent of making it tenantable again after the injury. In our judgment, a reasonable construction of the phrase "or otherwise," as found in the present lease, taken in connection with other covenants and provisos, would be that defendants are not entitled to a suspension of rent for a longer period than would appear necessary from the evidence to make the repairs, whether the same be made by the lessees or owner. In the instant case the language used in the lease readily bears the interpretation given it by the trial court, and that is generally given by the courts to the same or similar provisions, and by our own Supreme Court in *Lewis v. Hughes, supra.* By the specific provisions of the lease the premises are to be kept in good repair by the tenant, and so delivered at the expiration of the term, except as to loss occasioned by fire, inevitable accident or ordinary wear. But if, by reason of fire or otherwise, the premises become untenantable, all payments of rentals are suspended while the premises are being made tenantable. Notwithstanding the use of the phrase "or otherwise," we think the clause relating to the suspension of rent refers only to such loss or injury to the premises as comes fairly within the meaning of the words which relieve the tenant from the burden of making the repairs, as well as of the word "destruction," which relieves the landlord from the duty or liability to rebuild or repair the premises so as to make them tenantable, unless he so elects. The phrase "or otherwise" is given such limited meaning in *Lewis v. Hughes,* and that question may be regarded as *stare decisis* in this jurisdiction.

No contention is made that the premises were rendered untenantable by reason of fire, or ordinary wear, and there is no evidence that they became untenantable by reason of any act or force classified as "inevitable accident;" consequently the decisive question was one of interpretation of the lease, and not one of fact to be determined from conflicting evidence, and the court did not err in withdrawing the case from the consideration of the jury.

The words "or otherwise," used in leasing contracts, have been repeatedly interpreted as to their meaning and effect by the various appellate courts as well as by text writers. The following is quoted from Vol. 6, Words and Phrases, page 5105, viz.:

"The words 'or otherwise,' in law, when used as a general phrase following an enumeration of particulars, are commonly interpreted in a restricted sense, as referring to such other matters as are kindred to the classes before mentioned. Cent. Dict. The phrase 'or otherwise,' when following an enumeration, should receive an *ejusdem generis* interpretation."

In the case of *Jewel Tea Co. v. Watkins*, 26 Colo. App., 494, 145 Pac., 719, this court had under consideration a question similar to the one which now confronts us. The court determined the effect of the words "or other merchandise," immediately following the enumeration "teas, coffees, baking powder, extracts, spices, cocoa," and held that the general expression "or other merchandise" was confined to articles or goods kindred in nature to those previously enumerated. Presiding Judge Cunningham, who wrote the opinion, reviewed the authorities at some length, showing the conclusions of the court to be well sustained by the general current of authority. *Sims v. U. S. Trust Co. of New York*, 103 N. Y., 472, 9 N. E., 605; *Wallace v. Jones*, 83 N. Y., 152, 82 N. Y. Supp., 449; *Lowenstein v. Fidelity & Casualty Co. of New York* (C. C.), 88 Fed., 474.

The trial court properly found that the evidence failed to show whether the water causing the damage to the premises was the result of an ordinary rain, or of one unprecedented in its nature. It is of no importance, however, whether the rain was an ordinary or extraordinary one, as defendants, neither in their pleadings nor at the trial, made, nor do they now make, any claim for rebate of rent during the time the repairs were being made; from which fact we presume they elected to waive that claim and stand solely upon their asserted right of exemption from payment of any and all rent, subsequent to the time they vacated the premises, on November 30, 1912. The evidence is undisputed that within a brief period following the flood defendants, of their own volition, repaired the premises damaged, collected the greater part of the expense from plaintiff, and then continued to occupy the premises without interruption for four and a half months thereafter, when they vacated, and moved into a building of their own. The fact that defendants made the repairs at plaintiff's expense (though temporary, as they claim) and occupied the building for four and a half months thereafter, tends to negative defendants' contention that the building during that period was unsafe and untenantable. There is no evidence whatever to show that the building was unsafe or untenantable at the time defendants moved out.

It seems to be well settled in law that if a tenant has the right to declare a lease forfeited, and vacate the leased premises, under a covenant similar to the one we are now considering, and elects to do so, he must act promptly, and vacate without unnecessary delay. After the damage done, he cannot remain in the occupancy of the premises for such a length of time as suits his convenience, and then vacate, in reliance upon the covenant. If he fails to act with reasonable diligence in the premises, he waives such right. Defendants contend that under the circumstances the four and a half months' period of occupancy of the building by them

was a reasonable time in which they might exercise their option to terminate the lease and surrender possession, and that such question should be left to the jury. We are of the opinion that if all the evidence be considered together it clearly established a waiver on their part to take advantage of the covenant.

In *Tatum v. Thompson,* 86 Cal., 203, 24 Pac., 1009, the court had under consideration a clause to the effect that if the premises became untenantable by reason of fire, no rent should be charged or paid until the same were made tenantable again by the lessor. On August 5, 1884, the roof of the building was partially destroyed by fire, but the tenant remained in the premises until October 12th, paying the rent which accrued during that period. There was nothing in the evidence to indicate that the tenant intended to move out on account of the damaged condition of the premises, nor was any notice given to the lessor to repair the same. Under such circumstances the court held that the tenant elected to treat the premises as tenantable, and could not recover damages sustained by water coming through the damaged roof. The court said, in part:

"Plaintiffs did not elect to treat the place as untentable for their use, or either move out, or refuse to pay rent, but remained there, without any indication of intention to move; and regularly, on the 5th of each month, the collector called as usual for the rent, and they as regularly paid it. * * * The plaintiffs continued to occupy and conduct their business as if there had been no fire. There is nothing to show that they ever claimed that the premises were untenantable, or notified the defendant to repair, or took any steps to put him in default for not repairing. * * * We think, with the court below, that the plaintiffs elected to treat the premises as not untenantable, and governed themselves accordingly, and that they cannot recover in this action."

To the same effect, *Kiernan v. Germain*, 61 Miss., 498, and *Roach v. Peterson*, 47 Minn., 462, 50 N. W., 601. The facts in the California case and the case at bar are quite similar. In the instant case defendants remained in possession of the building for over three months after the damage was done, conducting their business as before the injury, before they indicated any intention of vacating the premises. They then began to move, and continued moving for several weeks thereafter, until they finally surrendered possession on November 30th, all the time voluntarily paying the rent as it became due. Neither at the time of paying the rent, nor at any other time, did they notify plaintiff to repair, or that any other repairs were necessary than those already made by them. There is nothing in the abstract of record showing that the premises were untenantable during the four and a half months mentioned.

In the case at bar the facts relative to defendants' repair of the premises shortly after the damage done thereto, and their continued occupancy thereafter for four and a half months, as above shown, which are undisputed, sufficiently show a waiver on their part of the right to claim the premises were unsafe or untenantable by reason of the damage caused by the water, and the court was warranted in refusing to submit the question to the jury.

Other points discussed in the briefs need not be further noticed, as we are satisfied a determination thereof would not result in changing the conclusions we have already reached. As the record appears, the judgment was right, and should be affirmed.

Judgment Affirmed.

Decided April 12, A. D. 1915. Rehearing denied May 10, A. D. 1915.

[No. 4155.]

FULTON INVESTMENT COMPANY v. SMITH.

1. FRAUDULENT CONVEYANCES—*Voluntary—Subsequent Creditors.* A voluntary conveyance, without consideration, is not presumptively fraudulent as to a subsequent creditor. The subsequent creditor assailing it must show fraudulent intent on the part of the grantor therein. (280.)

So, of one to whom the voluntary grantor becomes liable for a tort committed subsequent to the conveyance. (280.)

The mere pendency of a suit by a third person against the grantor and others, for an alleged tort, is not sufficient proof of a valid debt or claim, although the suit is subsequently settled by the grantor's co-defendant without defendant's knowledge or consent. (281.)

Competent proof of the verity and legality of the claim asserted in such suit must be produced. (282.)

The evidence examined and held not sufficient to sustain the allegation of fraudulent intent in the conveyance.*

2. EVIDENCE. As to this case the evidence of actual intent to defraud an alleged prior creditor must be so clear and indubitable as to exclude the presumption of good faith, or fail to sustain an allegation of fraud of which a subsequent creditor can take advantage.* (286.)

3. —— *Conveyance to a Corporation for its Stock,* is sanctioned by statute, and is not voluntary or without consideration. (281.)

4. —— *Trust for Benefit of Grantor.* Section 2665 of the Revised Statutes applies only to transfers of chattel property, and avoids these only as to existing creditors. (284.)

5. EVIDENCE—*Presumptions.* The settlement of an action by the defendant, of itself raises no presumption that the demand asserted therein is a just one.* (283.)

6. APPEALS AND ERROR—*Presumptions.* Presumed that the trial judge did not consider incompetent testimony. (283.)

7. —— *General Findings—Construction.* A general finding will not be interpreted as declaring that of which there is no evidence. (283.)

*Syllabus by KING, J.

Error to Jefferson District Court. HON. H. S. CLASS, Judge.

MR. EDWIN H. PARK, for plaintiff in error.

MESSRS. CRUMP & ALLEN, for defendant in error.

KING, J., delivered the opinion of the court.

Action by Mary Smith to have cancelled, as fraudulent and void, a certain deed of real property standing in the name of The Fulton Investment Company, plaintiff in error,

and to have the title thereto adjudged to be in William A. Trogler, in order to subject it to execution on a judgment in favor of said Smith against said Trogler.

On the 11th day of April, 1912, plaintiff Smith obtained a judgment in the sum of $3,000 against said Trogler on a cause of action for tort, said to have been committed on or about August 9, 1910, upon which an execution, directed to the sheriff of Jefferson County, was issued and levied upon 800 acres of land, with water rights, situate in said county, as the property of the judgment debtor Trogler. March 10, 1910, or more than two years before the rendition of this judgment, and about five months before the tort upon which it was predicated was committed, the said real estate, alleged in the complaint herein to have been worth $50,000 or more, together with other property, was conveyed by Trogler to The Fulton Investment Company, and at all times since the record title thereto has been in said company. This action to have the deed from Trogler to the investment company cancelled is predicated on the allegation that the conveyance in question was purely voluntary, without consideration, and made with the intention to injure, delay and defraud the grantor's creditors existing and subsequent, especially one A. J. Ward, alleged to have been an existing creditor at the time of the conveyance; and upon the further allegation that the conveyance was made in trust for the grantor. By the decree of the court the deed was set aside, and Trogler was adjudged to be the owner of the property levied on.

1. The plaintiff was a subsequent creditor, whether her standing as such be regarded as dating from the rendition of her judgment or of the commission of the tort (malicious prosecution); therefore, as to plaintiff, the conveyance, even if voluntary and without consideration, and for that reason void as against then existing creditors, if attacked by them, is not presumptively fraudulent or void when attacked by her; but plaintiff must show, and the court

must find, fraud in fact, and fraudulent intent on the part of the grantor of which the plaintiff may take advantage. *Wallace v. Penfield,* 106 U. S., 260, 27 L. Ed., 147, 1 Sup. Ct., 216; *Moore v. Page,* 111 U. S., 117, 28 L. Ed., 373, 4 Sup. Ct., 488; *Phillips v. Wooster,* 36 N. Y., 412; *Carpenter v. Carpenter,* 27 N. J. Eq., 503; *Washington Nat. Bk. v. Beatty,* 77 N. J. Eq., 252, 70 Atl., 442, 140 Am. St. Rep., 555. But the conveyance was not purely voluntary or without consideration. The property was conveyed to The Fulton Investment Company in consideration of the issuance of its capital stock. A transaction of that kind is sanctioned by statute; such consideration is a valuable consideration. *Homestead Mining Co. v. Reynolds,* 30 Colo., 330, 335, 70 Pac., 422. Under the statute, capital stock of a corporation is regarded as money or its equivalent. *Robinson v. Canal Co.,* 2 Colo. App., 17, 27, 29 Pac., 750. *Prima facie,* the conveyance was *bona fide,* and for a valuable and lawful consideration. From the time of the transfer the corporation took, and thereafter maintained, exclusive possession of and dominion over the property. This was conceded by counsel for plaintiff on the trial, who stated that the only contention was as to the validity of the transfer.

There is not a scintilla of evidence, direct or circumstantial, nor anything from which a legitimate inference can be drawn, except the mere fact of the coveyance, that the deed was made for the purpose of hindering, delaying or defrauding the plaintiff herein, nor any other person who might subsequently become a creditor of the grantor, nor that any creditor of or other person having claims, debts or damages against the said grantor, plaintiff included, was in fact hindered, delayed or defrauded by reason of such conveyance. So far as disclosed by the record, Trogler was not, at the time of said conveyance, indebted to any person, with the exception of certain encumbrances on the said property which could not be affected by the conveyance. Nor were there any suits or claims against him, except the

claims of said Ward. At the time of said conveyance two suits were, and for two years had been, pending in the District Court of Jefferson County, in which A. J. Ward was plaintiff and William A. Trogler was defendant, based upon allegations of tort, and demanding damages in the sum of $15,000. In each of those cases answer was filed, denying liability, and all material allegations of the complaint, and in one of them Trogler filed cross-complaint or counter-claim for fraud alleged to have been practiced upon him by said Ward. The pendency of those two suits was the basis of the present action, so far as concerned the existence of creditors who could have been hindered, delayed or defrauded by the conveyance from Trogler to The Fulton Investment Company. In one of said suits, for the largest demand, David E. Trogler and John C. Trogler, sons of William A. Trogler, were co-defendants. The evidence shows that on or about the first day of April, 1912, the two suits were settled in full by David E. Trogler, by payment of $500, which settlement and payment was made while William A. Trogler was absent from the state, and without his knowledge or consent. There was no other proof of the verity or legality of the claim of said Ward against Trogler, and no proof that the tort was committed as therein alleged. It is settled law that whenever the rights of an alleged creditor depend upon the existence of prior debts or demands, he must show that there are or were such debts or lawful demands. *Homestead Mining Co. v. Reynolds, supra,* p. 336, and cases there cited; *Washington Nat. Bk. v. Beatty, supra,* Bump Fraudulent Conv., Sec. 297, and cases there cited. In *Washington Nat. Bk. v. Beatty, supra,* under circumstances strikingly similar to those at bar, the court held that a subsequent creditor who attacks a conveyance as made in fraud of a person who at the time of the conveyance was claiming damages based on the tort of the grantor must make legal proof of the verity and legality of said claim, citing *Baker v. Gilman,* 52 Barb. (N. Y.), 26.

With such ruling we are in entire accord. In *Homestead Mining Co. v. Reynolds, supra,* the court ruled that as against the mining company to which Wall and Pursel had conveyed real estate, the plaintiff Reynolds, who attacked the deed as fraudulent, must prove the existence of the indebtedness at the time of the conveyance, although such indebtedness had been merged into a judgment in favor of plaintiff and against said Wall and Pursel. We think there is no question that it was incumbent on plaintiff herein, by competent evidence, to prove the existence of a lawful and valid claim on the part of Ward against Trogler, and, failing so to do, the judgment cannot be sustained. The fact that David E. Trogler made settlement of the two suits is not sufficient. Either he or his father had a right to purchase his peace from such litigation, and the mere fact that either of them did so, of itself, raises no legal presumption that the claim was just or lawful. Nor can a settlement by the son be tortured into an admission by the father that the claim was meritorious or lawful as against him. Moreover, keeping in mind the fact, established by the proof, and not disputed, that the land was paid for by stock, and the stock assigned so that David E. and John C. Trogler received and held at least $10,000 of the same in amount and value, and that those two sons were co-defendants in the larger of the Ward suits, the assertion that the father, with intent to prevent the collection of a judgment, if one should be obtained, would transfer his property to his sons and co-defendants, in whose hands it would be none the less subject to execution than in his, is manifestly too absurd to be credible or worthy of consideration.

2. Although the findings of the court were general, and to the effect that all allegations of the complaint were sustained, we cannot assume that the court found that the deed to the real estate was made in trust for the grantor, for there is no evidence to support such finding. There was

no such reservation in the deed; no evidence of a secret agreement or understanding as to the real estate. The only evidence suggesting a trust agreement or understanding had reference entirely to the manipulation of the capital stock. After the capital stock had been issued to Trogler in payment for the deed to the land mentioned in the complaint, and other property, real and personal, but long prior to the alleged tort, he assigned to his wife and children all but one share of said stock. Upon receiving her stock, the wife made an endorsement thereof in blank, and delivered it to her son, David E., and left it, with other stock so assigned, in a safety deposit box, of which he had all the keys, but which bore the name of himself and father. The father, however, never exercised control over the box or the stock. The wife died December 23, 1911. One week prior thereto she assigned all her stock to her children, and the certificates theretofore held by her were cancelled and the stock re-issued in the name of the children. The evidence also tends to show that the stock issued to the children was, or was understood to be, assigned in blank and deposited in like manner as that of the wife. The statute of frauds provides that all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against creditors existing of such person. Section 2665, R. S. '08. It will be observed, however, that this section applies to *existing* creditors only, and is limited to transfers of personal prporety. Under it there is no necessity of proving intent to defraud, but if the assignment is shown to be in trust for the grantor, it is, as to existing creditors, the same as if no transfer had been made. Upon the question of whether there is sufficient evidence to support a finding that the stock, or any of it, was assigned in trust for the grantor, we express no opinion; but even if it be conceded that the evidence was sufficient to sustain an inference of a trust for the grantor

as to the stock, that fact would not sustain a judgment setting aside the conveyance of the real estate; but if it were possible to sustain this judgment so as to subject either the real estate or the capital stock to execution for payment of the judgment against Trogler, it would be unconscionable, a reproach to the courts in the administration of justice, to permit the sacrifice of 800 acres of land, which plaintiff herself alleges to be worth $50,000, to satisfy an execution for $3,000, when, so far as the record shows, the capital stock could be as well and readily subjected to execution as could the real estate, and in sufficient quantities only to satisfy the judgment, with costs.

We have said that the record contains no competent evidence, direct or circumstantial, that the deed was made with actual intent to defraud creditors, existing or subsequent, except the mere fact that the conveyance was made, and that at the time it was made two suits were pending, in neither of which plaintiff herein was a party. There is no testimony of statements by Trogler that he would make, or admissions that he had made, the deed to defeat such suits or claims. On the contrary, there is the testimony of the Troglers, father and son, that the deed was not made with such intent or purpose; that the Ward claims were not discussed at the time of the transaction or while it was under consideration. The grantor testified that the corporation was formed, and the property conveyed to it by him for its capital stock, under advice of counsel, because of his advanced age, and his desire to retire from the active control of business, and to avoid the necessity of a will and its probate, and the administration of the estate, in the event of his death. These statements, both as to the purpose of the incorporation and deed to it, and that the Ward suits and claims did not induce it or enter into the discussion of it, were fully corroborated by two lawyers who had so advised Trogler, one of whom prepared the articles of incorporation. So far as disclosed by the evidence, the acts

of Trogler were perfectly consistent with good faith. We have often said that proof of fraud in its odious sense, *i. e.*, actual, intentional fraud, such as is here charged, and which if true amounted to a crime (sections 1846 and 1847, R. S. '08), must be strong and convincing, in order to sustain a verdict or a judgment. It must not be founded on mere suspicion. Applied to the facts of this case, we think that the evidence of intent to defraud Ward must be so clear, precise and indubitable as to exclude the presumption of good faith, or wholly fail. *D. & R. G. v. Sullivan*, 21 Colo., 302, 41 Pac., 501. The finding of the trial court is so manifestly against the weight of the evidence that this court is not bound to sustain it. *Thuringer v. Trafton*, 58 Colo. 250, 144 Pac., 866.

The judgment is reversed and the cause remanded, with directions to vacate and annul the levy of execution made on the real estate of defendant, and any sale thereunder, and for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

On Petition for Rehearing:

The statements made by counsel for defendant in error in their petition for rehearing, and in their printed brief, as well as oral argument in support thereof, indicate a conception of the views of this court so different from those expressed in the opinion or entertained by the court, and an understanding of the evidence so completely at variance with the record, that we feel constrained to take some notice thereof in denying the petition, proceeding on the assumption that counsel did not wilfully distort the plain meaning of the opinion, nor intentionally misstate the evidence.

1. We did not hold, as counsel state, that the Supreme Court, in *Homestead Mining Co. v. Reynolds*, 30 Colo., 330,

70 Pac., 442, decided that the issuance of capital stock in payment for property conveyed to the corporation was "a bar to an action to set aside the conveyance on the ground of fraud," but that it was a valuable consideration for such conveyance, and that a subsequent creditor, relying on prior debts to invalidate the deed, must prove the existence of such debts at the time of conveyance.

2. It is true that the complaint alleged, and the answer admitted, that the transfer to the corporation was voluntary, but plaintiff was not satisfied with the admission, and proceeded to prove quite conclusively that it was not without a valuable consideration. However, our decision is not predicated in the slightest degree on that distinction. We regard it as immaterial, as to plaintiff, a subsequent creditor, in the absence of proof of existing debts at the time of the conveyance, or of actual intent thereby to defeat the just claims of creditors, existing or subsequent. The law holds certain transfers void as to creditors, although made in good faith, and for want of a better term the term "constructive fraud" is often used as to such transfers. But the distinction between actual, intentional fraud, and so-called constructive fraud, although not important as to existing creditors, is vital when subsequent creditors attempt to set aside the transfer. Counsel for defendant in error ignore or refuse to admit that distinction.

3. We did not hold that sec. 2665, R. S. '08, was applicable to this case. We held that it was not, as that section applies to personal property only. *Eppich v. Blanchard,* 58 Colo. 139, 143 Pac. 1035. We considered the analogous common law rule as to real estate, that a transfer thereof to another, while the beneficial interest is retained by the grantor, is void as against creditors, to the extent at least of the interest so retained, but held that it is not applicable to the instant case, because there is no proof of the retention by the grantor of a beneficial interest in the real estate. The relation of trustee and *cestui que trust,* existing be-

tween a corporation and a stockholder, or the beneficial interest which every stockholder has in the assets of the corporation, do not *per se* bring the stockholder or the property conveyed by him to the corporation for stock, within the contemplation of the statute as to transfers of personal property, or the common law rule as to conveyances of real estate in trust for the grantor. To hold that it would create that relation would conflict with and nullify the statute. Sec. 851, R. S. '08; sec. 994, M. A. S. '12, as construed in *Homestead M. Co. v. Reynolds, supra.* Moreover, such trust relation would certainly not operate to defeat the transfer in favor of a creditor whose claims accrued after the stock so received had been assigned. Neither the statute nor the rule mentioned is founded on the conception of actual fraud in the transaction, but that the owner of the beneficial interest is the real owner of the property. Of course, if the transfer to the corporation is a mere subterfuge, and thereafter the grantor possesses, controls and deals with the property as he did before, the creditor is not affected thereby. Such are not the facts of the instant case, as we showed in the opinion.

4. Counsel assert that the statement in the opinion that plaintiff at the trial conceded that The Fulton Investment Company maintained exclusive possession of and dominion over the real estate is not correct. That concession or admission is made by counsel at folio 229 of the record.

5. We find no conflict in the evidence that Trogler did not know of or consent to the settlement made with Ward. The testimony of Mrs. Ward, that Keitel told her that Trogler asked him to negotiate for settlement, was objected to, was incompetent, and cannot create a conflict. Keitel was not shown to be Trogler's agent or representative. The contrary was shown. It must be presumed that the trial judge did not consider such incompetent testimony.

6. Counsel ridicule our reference to the fact that David Trogler and his brother, co-defendants with their

father in the Ward suits, were given and retained $10,000 worth of capital stock subject to execution if judgment had been obtained, as tending to controvert the legitimacy of an inference that the transfer was fraudulent. At the risk of giving occasion for further ridicule, we here call attention to the proof that Ward offered to settle for $75 (f. 198) the claim upon which he sued for $15,000, and that arbiters appointed at the suggestion of David Trogler fixed the damages at only $150, but that W. A. Trogler denied all liability and refused to pay any thereof (f. 246 *et seq.*). That was the alleged debt, to avoid which it is said that Trogler conveyed $100,000 worth of property to the defendant company. Under this evidence the suits savored of blackmail, precisely as Trogler treated them.

7. Counsel say that this court had no right to assume that the entire 800 acre tract of land levied on was sold, or that any of it was sold. It is true the printed record does not disclose that fact, but it was admitted in this court by counsel in his argument in the main case, and that plaintiffs had title through sheriff's deed. The complaint states that the entire tract was levied on and had been advertised for sale by the sheriff. The decree of the court annulled and set aside the conveyance to the entire tract. Counsel now say that only 320 acres were sold. It is not so grossly unconscionable to sell property worth $20,000, to satisfy a judgment for $3,000, as it would be to sacrifice property worth $50,000 for that purpose, but we regard it as unconscionable, nevertheless. Plaintiff came into a court of equity and has not done equity.

8. Counsel object because we say that the findings of the court were general. The record so shows. It is true that counsel incorporated into their brief what purports to be special findings of the court; but we do not regard the brief as a part of the record, any more than we do the large volume of other matter, occurring after trial, sought to be imported into the record for our consideration. However,

we read and gave careful consideration to the alleged special findings, and accorded credit to such thereof as we believed were supported by competent evidence.

9. Counsel contend that W. A. Trogler's testimony is contrary to evidence given by him before the Federal court. There is nothing in this record to show what his testimony in the Federal court was, and nothing to show that it conflicts.

Perceiving no reason for reopening the case, the petition for rehearing is denied.

Decided April 12, A. D. 1915. Rehearing denied June 18, A. D. 1915.

[No. 4049.]

MOODY ET AL. V. SINDLINGER.

1. EVIDENCE—*Public Records.* The question being as to the date of maturity of a chattel mortgage, subsequent to an extension, oral testimony of the mortgagor as to a conversation with the agent of the mortgagee, rejected, as insufficient to overthrow the record of the extension, as it appeared in the office of the recorder. (293.)

2. DAMAGES—*Duty of Plaintiff to Minimize.* One whose papers have wrongfully been taken from him is under duty to accept the offer of the wrong-doer to return them. He is not permitted to aggravate his damages by declining the offer. (296, 297.)

3. —— *Exemplary.* Under the statute (Rev. Stat., sec. 2067), to warrant the allowance of exemplary damages there must be an element of fraud, malice, evil intent, or oppression in the act complained of. Mortgage of a desk and other office furniture. The mortgage being overdue, after many extensions and repeated demands of payment, subsequent to maturity, the mortgagee went to the office of the mortgagor and in the latter's absence by mistake left in the office the desk described in the mortgage, taking away another and different desk. There was evidence that he had been told by the mortgagor that the desk so taken was included in the mortgage. *Held*, that the mistake in the article taken, and the inconvenience occasioned to the mortgagor by being deprived of the papers contained in the desk, for a few days, afforded no warrant for an allowance of exemplary damages, and that it was error to submit that question to the jury. (297.)

4. PERSONAL LIBERTY—*Body Judgment.* In the same case *held* that to award execution against the body was error. (299.)

Error to Denver District Court. HON. JOHN H. DENISON, Judge.

MR. GEORGE J. HUMBERT and MR. H. H. WHITTIER, for plaintiffs in error.

MR. W. W. ANDERSON, for defendant in error.

BELL, J.

On December 9, 1909, A. W. Sindlinger, defendant in error and plaintiff below, hereinafter called plaintiff, borrowed of J. P. Moody, one of the plaintiffs in error and a defendant below, the sum of $12 for one month, on his promissory note, secured by a chattel mortgage on one 4½-foot flat-top oak desk, one 4-foot low roll-top oak desk, three swivel chairs, five common chairs, one worn brussels carpet, containing about 22 yards, and all office furniture, equipment, etc., then had and used at Room 15, 1624 Curtis Street, Denver, Colo. Moody himself prepared the mortgage for execution, and filed the same for record. The note was made for the payment of $15, and whether the additional $3 represent the expenses of preparing and filing the papers for record, advanced interest, a bonus or something else, is not disclosed by the record. The note was not introduced in evidence; but we infer from the evidence that plaintiff was required to pay $1 per month for the use of the money, and paid the costs of two extensions hereinafter mentioned. The property covered by the mortgage was removed by plaintiff, with the consent of Moody, from Room 15, 1624 Curtis Street, to offices on Champa Street. On January 7th, 1911, between 5 and 6 o'clock P. M., Moody and his co-defendant, Grutzmacher, an expressman, the other plaintiff in error herein, entered the unlocked office of plaintiff on Champa Street, and in his absence removed therefrom certain property, including a certain roll-top desk, in which were locked one Oliver typewriter, and business and private papers of the plaintiff, all of which prop-

erty, with the exception of said papers, which Moody claims to have returned, Moody sold, after due advertisement, in the foreclosure of his mortgage. For this taking, carrying away and conversion of said property, plaintiff instituted this action, alleging in his complaint malice on the part of the defendants, and praying judgment in the sum of $1,500 for the damages alleged to have been suffered, and that a body execution be issued thereon. The defendants, in their answer, denied the material allegations of the complaint; and for a further defense, alleged that the property in question was taken under and by virtue of the provisions of a chattel mortgage from plaintiff to Moody, which had matured upon default in the payment of a promissory note, for which it was given to secure. The case was tried in the County Court of the City and County of Denver, and resulted in a judgment in favor of the plaintiff in the sum of $247.50 and costs, from which an appeal was taken to the District Court of said City and County, and the case tried there to a jury of six, who returned a verdict as follows:

"We, the jury, find the issues herein joined for the plaintiff, and assess his damages at the sum of seven hundred and fifty no-100 dollars and ..... cents, and that said defendant J. P. Moody was guilty of fraud, malice and wilful deceit.

($750.00) "George J. Lord,
"Foreman."

Upon this verdict judgment for the amount thereof was entered against both defendants, and it was ordered that plaintiff have execution against the body of defendant Moody, and that he, Moody, be committed to the jail of the City and County of Denver for a term not exceeding three months, to be released, however, upon the payment of the judgment so rendered against him.

At the trial plaintiff's principal contentions were that the mortgage, by reason of a certain extension thereof, did

not mature until January 9th, 1911, two days after the property was taken in foreclosure, and that the desk and its contents, taken by defendants, were not covered by the mortgage.

As to the first of these contentions, plaintiff testified that on or about August 16th, 1910, he paid to a Mr. Stempe, an agent of Moody, the sum of $2 for an extension of the mortgage, and received a receipt therefor. Continuing, he said:

"After he gave me this receipt I paid him the $2. He got up to go out; says I, 'Mr. Stempe, you have not given me the date of the extension—have not written on this receipt; I have given you $2 for an extension.' 'Well,' says he, 'I suppose that is the old extension of six months, but you must see Moody,' and that is my receipt; then I noted, myself, on the edge here, right in his presence, 'January 9, 1911.' I wrote that myself, in his presence, because he said, 'I suppose the extension would be like the former.' I went up and saw Moody a number of times in reference to the matter, and he never said it was not like the former extension."

On cross-examination he admitted that he never saw Moody about the matter, and that he never examined the records to learn to what date the mortgage had been extended.

Defendants introduced in evidence a certified copy of the record of an extension, which was acknowledged and filed for record August 6th, 1910, and extended the mortgage to and including November 9th, 1910. Moody testified that this was the last extension made, and it was the only written evidence of an extension received or offered at the trial. This instrument, therefore, should control as to the date of the maturity of the mortgage as extended, as there was no evidence of fraud, accident or mistake to justify its overthrow or contradiction by the mere oral testimony of the plaintiff.

The mortgage, then, having matured or become due November 9th, 1910, as evidenced by this extension, defendant Moody was at liberty to foreclose in a proper manner, and in accordance with the terms of the statute any time after this date; and it now remains to be determined whether or not the record shows that he exceeded his rights in pursuing his remedy.

The record is crowded with evidence to the effect that soon after the note as extended matured, Moody informed plaintiff that he could not further extend it, or carry it longer; that the amount was so small that it cost him more to look after it than it was worth; that he and his employees had made repeated written and verbal demands for the settlement of the amount due, and though none of the principal had been paid, and some of the interest had lapsed, he offered to accept $10 and release everything; that on Saturday, the 7th day of January, 1911, two months, lacking two days, after the maturity of the note, he, in the absence of the plaintiff, left notices at his office that it would have to be settled on that day. Late in the afternoon he, becoming fearful that the plaintiff had not received the notices, sent an employee to plaintiff's home, and informed him that the goods would be taken that day unless he should come to the office or arrange for the settlement of the claim. Plaintiff informed the agent that the note would not be due until the following Monday, and that he would settle it when due. He admitted to the agent that he then had the amount with which to make settlement, but made no further offer or tender in the matter. About 5:30 o'clock P. M., after Moody had exhausted every reasonable endeavor to obtain a settlement, and after the mortgaged property had been subject to the claims of plaintiff's creditors and subsequent purchasers for some 28 days in preference to the claim of the mortgagee, Moody with Grutzmacher, his co-defendant, and another assistant, entered the unlocked office of the plaintiff, which was also occupied by a Mr. Lovell, and took

orderly possession of the mortgaged property, except some broken chairs and a roll-top desk, which seems to have been left by mistake. A larger roll-top desk, which contained some papers and an Oliver typewriter, which had been purchased subsequent to the execution of the mortgage, and mixed with the mortgaged property without the knowledge of Moody, was taken by mistake in lieu of the desk left at the office. Almost immediately after the removal of the property, Moody returned some loose papers, and sent the plaintiff a note, which he received, demanding the key of the desk taken by mistake, and informing him that he would be glad to return any of the property not covered by the mortgage. Plaintiff failed to respond to the overtures of Moody, and after a number of days the desk was forced open, the papers carefully sacked and returned to him.

The values alleged in the complaint of all the property taken, excluding the papers, etc., aggregated $199.50. Plaintiff testified that the desk that was not covered by the mortgage was worth $65, and that the typewriter was worth $75. On cross-examination he admitted that he bought the desk on partial payments for $20, and the typewriter for $22.50, which he paid in payments of two and three dollars each.

It is evident from his testimony that he valued these two pieces of property at more than three times what he paid for them.

The mortgage described two desks, which were the only ones in plaintiff's office when the mortgage was executed, and after specifically mentioning the other articles hereinbefore enumerated, it contained a general provision including all office furniture or equipment then had or used in the office. Moody testified that he called upon the plaintiff at his office, and demanded a settlement, some 15 or 20 days after the note as extended had matured, and plaintiff insisted on a further extension, saying that he, Moody, did not need the money, and pointed out the very roll-top desk

which was taken, and in which the typewriter and papers were locked, and informed Moody that it was covered by his mortgage, and that the mortgaged property was worth two or three times the amount of his claim.

It is not at all strange or an evidence of carelessness that Moody should make a mistake in the selection of these desks, under the circumstances attending this long and tedious transaction; and there is nothing disclosed in the record that even tends to establish fraud, malice or wilful deceit in the taking of the property. In fact, the mortgagee used great patience, and made repeated endeavors to effect some kind of a settlement, and continued his negotiations for some 28 days after losing a preferred right to the property.

Defendant Grutzmacher was merely an expressman, who knew nothing at all about the transaction, and was engaged by Moody to remove the property. It is shown that he acted in the matter in the ordinary way and in the usual course of his employment, and moved the furniture to a storage house, as directed by his employer.

Under this character of evidence, a judgment against the defendants or either of them for $750 is grossly excessive, and has no support in the record.

Plaintiff's testimony to the effect that he had suffered great loss by reason of having his papers, forms and facilities for work taken from him was too uncertain and speculative upon which to base a claim for more than nominal damage. While it is insisted that defendants took a desk not covered by the mortgage, yet they left a desk that was so covered; some of the papers were returned immediately, and others were offered immediately; the key to the desk was requested, so that its contents could be ascertained; and it is admitted that Moody offered to return anything therein not covered by the mortgage. Under these conditions the plaintiff had the opportunity, and it was his duty, to minimize the damages by accepting the offer of Moody.

The jury were instructed that they might award reasonable exemplary damages. There is no substantial evidence in the record to justify such an instruction, and therefore the question was erroneously submitted to the jury. Whether there is any evidence to justify the finding of exemplary damages is a question for the court. If there is none, it is error to submit the question to the jury: *Eisenhart v. Ordean,* 3 Colo. App., 162, 170, 32 Pac., 495, citing 1st Sedg. on Damages, 3rd Ed., Sec. 387; *Rose v. Story,* 1 Pa. St., 190, 44 Am. Dec., 121; *Amer v. Longstreth,* 10 Pa. St., 145; *Pittsburg R. S. Co. v. Taylor,* 104 Pa. St., 306, 49 Am. Rep., 580; *Selden v. Cushman,* 20 Cal., 506.

To entitle a person to exemplary damages for a wrongful act, under sec. 2185, 1st Mills Ann. Stats., 1912, there must be an element of fraud or malice or evil intent or oppression entering into and forming part of the act: *Eisenhart v. Ordean, supra.*

In *Denver Tramway Co. v. Cloud,* 6 Colo. App., 445, 450, 40 Pac., 779, it appeared that Cloud was riding upon a car of the company on paid transportation, and the company's agents concluded that his transfer ticket was irregular, and forcibly ejected him from the car, using such force only as was necessary for this purpose. The trial court instructed the jury that they might award exemplary or punitive damages to the plaintiff, and Bissell, J., speaking for the Court of Appeals, said the evidence must disclose some wrong motive in the doing of the thing complained of, or else the circumstances of the act must show a reckless disregard of the injured person's right; that malice could not be implied; that the officers of the company made a mistake, and that the company should respond in compensatory damages; that the courts were not at liberty to infer bad motives, but that the proof must show the existence of such motives; or if the action was based on a disregard of the passenger's rights exhibited by the employee, it was equally

necessary to prove facts establishing this disregard, and its reckless character.

Geraghty v. Randall, 18 Colo. App., 194, 200, 70 Pac., 767, was an action by the purchaser of mining stock against the seller thereof to recover back the purchase price, on the grounds that the sale was effected through the false and fraudulent representations of the defendant. The jury returned a general verdict for the plaintiff, and in answer to a special interrogatory, found that the defendant was guilty of fraud and wilful deceit. The trial court sustained the general verdict, but set aside the special finding, on the ground that it was not sustained by the evidence. On appeal it was urged that the rulings of the trial court were contradictory in sustaining the general verdict, on the ground of fraud, and setting aside the answer to the special interrogatory, finding defendant guilty of fraud and wilful deceit. Judge Thompson, in speaking for the Court of Appeals, said it was contended that the trial court, in setting aside the special finding, found there was no evidence of fraud, and that, with the question of fraud eliminated, there was nothing in the case to support a judgment against the defendant. Continuing, he said:

"It is manifest that there was no inconsistency between the general verdict and the special finding. By their general verdict, as well as by their answer to the interrogatory, the jury found that the transaction was fraudulent; and there being no question of inconsistency between the two, we do not think that the action of the court in setting aside the special finding was inhibited by the code provision. In our opinion, sec. 2164 of Mills' Statutes contemplates an aggravated case—one in which the wrong is premeditated and intentional. A person may obtain the money or property of another by means of statements which are untrue, but of the truth or falsity of which he is without knowledge. In such case he might be held responsible as for a legal fraud, although there was no active intention to commit a wrong. *Converse v. Blumrich,* 14 Mich., 108.

"But while such representations have been held to be false and fraudulent in law, they lack the peculiar feature of guilt implied in the words 'malice, fraud or wilful deceit,' as used in sec. 2164. We think that from the connection of the word 'fraud' with the words 'malice' and 'wilful deceit' it was intended to be understood in its odious sense. By denying the motion to set aside the general verdict the court held that there was evidence of fraud, and we cannot suppose that it intended to contradict itself; so that in setting aside the special verdict on the ground that it was not supported by the evidence, the court must have regarded the finding as having reference to actual and intentional fraud. The court was evidently of the opinion that the evidence did not warrant the extreme conclusion reached by the jury in their special finding, regarding it, however, as amply sufficient to sustain the general verdict. Counsel are therefore mistaken as to the import of the court's ruling. This was not that there was no evidence of fraud, but that there was not sufficient evidence upon which a verdict, whose effect would be to deprive the defendant of his liberty, could be properly rendered."

In *Republican Pub. Co. v. Conroy*, 5 Colo. App., 262, 266, 38 Pac., 423, the court said the punitive damage statute, Session Laws 1889, page 64, did not operate to change the rule of damages in any case where nothing is shown except the naked wrong.

See also *French v. Deane*, 19 Colo., 504, 511, 36 Pac., 609; and *Page v. Yool*, 28 Colo., 467, 65 Pac., 636.

Of course, in view of these holdings, it cannot be said that the record presents any evidence of fraud, malice or wilful deceit on the part of Moody that can justify an execution against his body, as ordered by the trial court; and as the verdict of the jury is excessive and against the weight of the evidence, as hereinbefore pointed out, the judgment based thereon is reversd, and the case remanded.

Reversed and remanded.

[No. 4108.]

SCHOOL DISTRICT NO. 76, IN WELD COUNTY, V. KIRBY.

SCHOOLS—*Employment of an Unlicensed Person as a Teacher.* Under Rev. Stat., sec. 5990, a contract by a school board employing as a teacher one who has no license to teach is absolutely void. *Sedgwick County v. Johnson*, 26 Colo. App., 433, followed.

Error to Weld District Court. HON. ROBERT G. STRONG, Judge.

MR. R. E. WINBOURN, for plaintiff in error.

MR. GUY D. DUNCAN and MR. F. J. GREEN, for defendant in error.

CUNNINGHAM, P. J., rendered the opinion of the court.

This action was brought by the defendant in error, as plaintiff below, to recover for services rendered and to be rendered by her as a teacher in the public schools, under an alleged contract said to have been entered into between herself and the plaintiff in error.

It is undisputed that at the time plaintiff entered into the agreement to teach, she held no license or certificate. The record further discloses that the plaintiff was advised, after she obtained her license and before the term of school began, that two of the three members of the school board would object to her teaching.

During the two weeks that she actually attempted to teach, these two members made frequent visits to the schoolhouse and urged her to withdraw from the school. During the two weeks that the defendant in error attempted to teach, there was in the same room with her another teacher, who had been employed by the board, who was also attempting to teach the same grade; both teachers used the same desk. At the end of the two weeks defendant in error,

under protest, ceased teaching, and thereafter filed suit, and had judgment for the full amount which she should have received had she completed the term without opposition.

Since the present case was tried, and since the writ of error was sued out, this court handed down the opinion in *School Dist. No.* 46 *of Sedgwick Co. v. Johnson,* reported in 143 Pac., 264, wherein we ruled that under sec. 6754, M. A. S., 1912; sec. 5990 R. S., 1908, a contract entered into between a school board and a teacher not holding a license to teach is void *ab initio,* and that a cause of action supported only by proof of such contract could not be sustained, where the same was not in any manner lawfully ratified by the school board after plaintiff became qualified by receiving her certificate.

It is plain from the statement we have already made of the facts in this case that there can be no contention that the school board ratified the contract which they attempted to enter into with defendant in error, subsequent to the time she received her license, even if it be conceded that a void contract is susceptible of ratification. Neither is there any evidence of a new contract, express or implied, having been entered into between the parties hereto, after August 18th, the date of defendant in error's license. On the contrary, defendant in error, in her complaint, counts solely upon the specific contract or agreement which she entered into with the school board on *May* 20, *almost ninety days before she received her license.*

In addition to the authorities cited by Judge King in *School Dist. No.* 46 *v. Johnson, supra,* the following additional cases support the ruling therein announced:

School Directors v. Newman, 47 Ill. App., 364; *School Directors v. Jennings,* 10 Ill. App., 643; *Bryan v. Fractional School Dist., etc.,* 111 Mich., 67, 69 N. W., 74; *Butler v. Haines,* 79 Ind., 575; *Stevenson v. School Directors,* 87 Ill., 255; *Jenness v. School Dist.,* 12 Minn., 448; *Hosmer v. Sheldon School Dist. No.* 2, 4 N. D., 197, 59 N. W., 1035, 25 L. R.

A., 383, 50 Am. St., 639; Cyc, 1070.

On the authorities above cited, the judgment of the trial court is reversed, with directions to enter judgment dismissing plaintiff's complaint.

Reversed and remanded with directions.

On Rehearing:

Counsel for defendant in error has filed a spirited brief on rehearing, in which, with much frankness, we are admonished that "nothing but derision and disrepute can await a court which permits a decision to stand which misstates a record, and thereby reads a case out of a salutary and just rule, and into a technical one." Counsel then proceeds to state, with great positiveness, that there is nothing in the record to support our statement in the original opinion "that plaintiff was advised, after she obtained her license, and before the term of school began, that two of the three members of the school board would object to her teaching."

Mindful of our duty to state the record with substantial accuracy (a duty which we apprehend rests alike upon court and counsel), we have again gone carefully over the testimony offered on the trial of this cause. At folio 212 defendant in error testified that when she went to the schoolhouse on the first day of the term, "I found Miss Chorn, who said she had been hired to teach the same school that I had been hired to teach." At folios 219 to 224 plaintiff was interrogated concerning a certain letter from the board, which, at first, she insisted was directed to her brother, but later she was asked the following questions, and made the following answers:

Q. Will you state whether or not there was an objection to your continuing in the school?

A. To me?

Q. Yes.

A. I don't think so.

Q. You didn't see the letter?

A. Yes, I saw the letter.

Q. And don't you remember that in the letter there was objection to you?

A. Yes, I believe he did mention my name.

Q. When was that that you received that letter?

A. It was some time about the latter part of August, if I remember rightly. (The school began Sept. 5th.) * * *

Q. When did you first receive notice of the objection to your teaching the school after you had received that paper?

A. When I saw that other letter.

Q. Was that the first you had heard of it?

A. Yes, sir.

Q. So that when you went down to the school on Sept. 5th, on the opening day of school, you knew that there was, there would be, objection to your taking charge of the school?

A. That's what I would infer from that letter.

Q. And you knew that Miss Chorn had been placed there by the board to teach the same grade that you were an applicant for, didn't you?

A. Yes, sir. * * *

Q. You knew that all the objections to your teaching came from members of the board, and members of the board did object to your taking charge of that school on the opening day, did they not, Miss Kirby?

A. No, I don't think I did.

Q. From what parties then would the objection come, was it not from the members of the school board; you wouldn't pay any attention to any others?

A. Why, no.

Q. Didn't you know these objections were from the members of the school board?

A. From some members of the board.

Now, there were but three members of the board, and in the light of the testimony set forth above, which was

given by the defendant in error herself, we are unable to perceive in what respect our statement in the original opinion "that the record further discloses that the plaintiff was advised, after she had obtained her license and before the term of school began, that two of the three members of the school board would object to her teaching" is, as counsel have charged in their brief on rehearing, "in direct conflict with the record in this case."

Counsel state (and therein lies, we are sure, the explanation for the error into which they have fallen) "we assume that this court adheres to the usual rule, * * * that the abstract becomes the record upon which this court must base its decision." This court has always felt free to resort to the original bill of exceptions when dissatisfied with the abstract thereof, but we do not desire to be understood as intimating that such is the bounden duty of the court. In this case, because of uncertainty, we have examined the original bill of exceptions, and we do not feel that our conduct in this respect merits criticism or requires an apology.

In the original opinion we use the following language:

"During the two weeks that she actually attempted to teach, these two members of the board made frequent visits to the schoolhouse and urged her to withdraw from the school."

Commenting on this sentence counsel, in their brief on rehearing, say: "This statement is also in the face of the record. Without this mis-statement of the facts in this case the rule in the Johnson case cannot be invoked."

One of the members of the school board, during the time mentioned, did make frequent visits to the schoolhouse for the purpose of urging the defendant in error to withdraw from the school, the first visit being on the very first day that she attempted to teach, and concerning that visit defendant in error testified that "Mr. Buchanan was the next member of the school board that I saw that day. [Meaning the first day.] He told me that he wished me to leave

the school, that I had not been hired, and that I was disturbing the progress of the work. I told him that I was going to stay there until I had to leave. He made several visits and each time mentioned something about the school." Now, Mr. Buchanan was the secretary of the board—one of the two members who had signed the so-called written contract, to which we refer in the original opinion. The other member of the school board to whom we refer in the extract from our original opinion, last above quoted, appears not to have "made frequent visits to the schoolhouse," but to have made only a single visit. However, we were attempting, in the original opinion, to negative the contention that the school board had ratified the void contract, or rather, had, as in *Hotz vs. School Dist.*, 1 Colo. App., 40, 27 Pac., 15, done anything, after defendant in error had begun to teach, which "was equivalent to the making of a new contract upon the terms of the one into which they had attempted to enter." Whether Beiderman, the second member, had made frequent visits or but a single visit to the schoolhouse, does not seem to us to be at all vital, especially since the record discloses, without contradiction, so far as we are able to discover, that he never signed the original contract; in fact, had no knowledge that it had been signed until a week or ten days after it was executed, and he had no notice of the special meeting at which Buchanan and the third member of the school board appear to have drafted and signed the writing. We think it can hardly be contended that with the secretary, who did sign the original contract, persistently urging the defendant in error to quit the school, from the very first day she began to teach until the last day that she remained there; with Beiderman, the second member, never having consented to her employment, and having appeared at the school during the first two weeks for the purpose of protesting against her teaching, that the board did anything which "was equivalent to the making of a new contract upon the terms of the one into which they attempted to enter."

So far as we have been able to discover, all of the ratifying of the absolutely void contract of May 20th (void because entered into by two members of the board, at a special meeting, without notice to or knowledge of the third member, as well as for the reason pointed out in our original opinion), was done by a single member of the board. We think it may fairly be inferred, from the testimony of Miss Kirby and her brothers, that a heated controversy had arisen during the month of August over the regularity of her appointment. They testified that Mr. Saunders, who was present on the first day of the school to "install" defendant in error, stated in their presence, during August: "We have employed your brother, Joe, and your sister to teach in our school for the coming year and *I will be present to see that they take their places*, or words to that effect"—italics ours.

As a further indication that defendant in error was aware of the opposition to her, long before she began to teach, we find Saunders (the only member of the board who ever said or did a thing, after she obtained her license, from which a new contract of employment might be inferred), in the law office of Mr. Duncan, attorney for defendant in error, during the month of August, in the company of her brother, asserting the regularity of Miss Kirby's employment, and basing his claim of regularity upon the statement that the board *had delegated to him the power to employ her.*

Counsel for defendant in error further complain of our announcement in the original opinion that "defendant in error, in her complaint, counts solely upon the specific contract or agreement she entered into with the school board on May 20th, almost ninety days before she received her license." They insist that, when rightly construed, the complaint in the case presents the issue of "ratification, acquiescence, estoppel and a new implied contract" and that even if the complaint was defective in this regard, such defect was waived by their adversary. There is, we freely concede, a fair basis for this contention, but in our view of the case,

if the contention be granted, it cannot change the results, since, for the reasons pointed out in the original opinion, as well as from the quotation from the defendant in error's own testimony, set out herein, it is clear that the proof would not support the issue of ratification, acquiescence, estoppel or a new implied contract. On the contrary, the record conclusively negatives that issue.

Defendant in error insists, in her brief on rehearing, as well as in her former brief, that, on the strength of the written agreement of May 20, she attended Summer school. She thereby seeks, we infer, to sustain her theory that the board is estopped to deny the legality of said agreement. We are unable to discover either allegation or proof to support this contention. There is proof that she attended the Summer school, but there is no hint that she would not have done so had the writing never been signed. Indeed, her brother, Joseph Kirby, testified that before his sister had applied for the school, he had a talk with the president of the board, in his sister's interest, wherein, to use his own language, "I told him she would finish in June, [Meaning she would finish the course at the Boulder State Preparatory School] and she expected to attend Summer school in Boulder six weeks and she expected to take the examination at the close."

We do not feel that the slight inaccuracies in the original opinion, to which defendant in error has called our attention, are of sufficient importance to change the result or justify a rehearing.

Rehearing Denied.

Decided May 10th, A. D. 1915. Rehearing denied June, 14th, A. D. 1915.

[No. 4097.]

DE LA VERGNE V. GLOBE PRINTING COMPANY.

1. NEGOTIABLE INSTRUMENTS—*Presentment for Payment.* A promissory note expressed to be payable at a bank named therein is sufficiently presented for payment by the deposit thereof in such bank, for collection. (310.)

2. —— *Notice of Dishonor,* need not be alleged in an action against the endorser, where it is alleged that payment was demanded of him.

3. —— *Oral Notice of Dishonor,* suffices. (Rev. Stat., sec. 4459.) (310.)

4. —— *Time of Notice.* A promissory note payable on the fifth of the month was presented for payment on that day and dishonored. The holder residing in Denver and the endorser in Colorado Springs, oral notice to the endorser on the seventh was in due time. (Rev. Stat., sec. 4567, cl. 2.) (310.)

5. PLEADINGS—*Defects—Aider by Pleading Over.* Action against the endorser of a promissory note, the complaint not alleging notice to him of the dishonor. The defendant's answer having denied notice, and this denial being put in issue by the reply, *held* the defect of the complaint was cured. (309.)

Error to Denver District Court. HON. H. P. BURKE, Judge.

Mr. FRANCIS J. KNAUSS, Mr. WM. A. COOK, for plaintiff in error.

Messrs. DAVIS, WHITNEY & MOTHERSILL for defendant in error.

KING, J., delivered the opinion of the court.

This is an action by The Globe Printing Company, a corporation, endorsee, against E. M. De La Vergne as endorser of a promissory note made by W. D. Ham, payable to De La Vergne, February 5, 1913, at the Federal National Bank of Denver. After demurrer overruled, the defendant denied presentment to him for payment, and alleged that notice of dishonor had not been given him, and that he had not waived presentment, demand or notice of dishonor, which allegations were denied by the replication. Judgment for plaintiff.

1. The complaint alleged presentment at the Federal National Bank, February 5, 1913, to, and demand for payment made on, the endorser as well as the maker. Section 115 of the Negotiable Instruments Law provides that notice of dishonor is not required to be given to the endorser "where the indorser is the person to whom the instrument is presented for payment."—Mills' Ann. Stats. section 5165; R. S., '08, section 4578; in re Swift, 106 Fed., 65, 69. Therefore, the demurrer was properly overruled.

After failure to prove presentment to the endorser, the complaint alone was not sufficient to admit of evidence to prove that notice of dishonor was either given or waived.—*Sykes v. Kruse,* 49 Colo., 560. But the allegations of the answer, denied by the reply, constituted an "express aider" of the complaint, and cured its defects.—Chitty, Pleading (7th Am. ed.), *703; *Cowell v. S. D. R. E. Co.,* 16 Colo. App., 108, 63 Pac., 991; *Chesapeake & O. R. Co. v. Thiemann,* 96 Ky., 507, 29 S. W., 357; *Slack v. Lyon,* 9 Pick., 62; *Stivers v. Horne,* 62 Mo., 473, 475; *Wall v. Grimly,* 52 Conn., 35; 31 Cyc. 714. Moreover, no objection was made to the proof offered on the ground that the complaint was insufficient.

2. To affirm the judgment, we need not agree with the trial court in holding that the giving of notice of dishonor was not required nor waived, nor, indeed, decide those questions. Presentment to the endorser was not made, but the court found that notice of dishonor had been duly given. The evidence on the part of the plaintiff shows that the note was endorsed in blank by defendant and delivered to plaintiff; that plaintiff endorsed it and left it in the Federal National Bank until and during all of February 5th; that on January 27th plaintiff notified the defendant by letter that the note was at the bank, and that Ham, the maker of the note, would not be able to pay it, and asked defendant to attend to it promptly. On February 6th, the bank told the plaintiff that the note had not been paid. About 9 a. m. on February 7th, plaintiff gave oral notice to defendant

that the note had not been paid. Under our statute, such evidence sustained the finding of fact made by the court. Oral notice is sufficient.—Mills' Ann. Stats., section 5146; R. S. '08, section 4559. The note was dishonored in the hands of an agent, to-wit, the bank, which notified its principal, the plaintiff, in due time.—Mills' Ann. Stats., section 5144; R. S., '08, section 4557. Plaintiff resided at Denver, defendant at Colorado Springs. Oral notice given to defendant on February 7th was in due time under subdivision 2 of section 5154, Mills' Ann. Stats.; section 4567, R. S., '08.

3. It is urged that presentment to the maker of the note is not shown, therefore the endorser is discharged. With this contention we do not agree. When a note is made payable at a bank, it is considered a sufficient presentment of it if it is actually in the bank at maturity, ready to be delivered to anyone who may be entitled to it on payment. Such is the general rule, whether the bank is the holder of the note, or merely an agent for collection.—Daniel, Neg. Instr., sections 636, 656, 657; *Nichols v. Goldsmith*, 7 Wend. 160; *Bank of U. S. v. Carneal*, 8 U. S. 204; section 5137, Mills' Ann. Stats.; section 4550 R. S., '08.

For the reasons given, the judgment is affirmed.

Affirmed.

[No. 4113.]

CONANT, ADMINISTRATOR, ET AL V. MACHEN.

EXECUTORS AND ADMINISTRATORS—*Administration—Presentation of Claims.* Defendants had taken up at the bank a note of their father, giving in lieu thereof their own note, which they afterwards paid. Upon the decease of the father, defendants, by request of all interested parties, assumed possession of the properties pertaining to his estate, and managed the same for several years. The will of the father being afterwards admitted to probate, and another being appointed administrator with the will annexed, defend-

ants were ordered by the County Court to file an account of their administration while managing the estate. Their account, filed in compliance with this order, was approved by the County Court. On appeal, the District Court disallowed so much of their account as related to the note of the father which they had paid to the bank, solely upon the ground that the note of the father had not been presented to the County Court for payment within the period of one year. *Held*, that inasmuch as the note of the father had already been discharged it could not be presented for payment, and the account of the defendants having been presented within the year following the appointment of the administrator, the statute was satisfied. (314, 315.)

Error to Rio Grande District Court. HON. CHAS. C. HOLBROOK, Judge.

MR. JESSE C. WILEY, for plaintiffs in error.

MR. JAMES D. PILCHER, for defendant in error.

CUNNINGHAM, P. J., rendered the opinion of the court.

As nearly as we are able to determine from an insufficient abstract and a defective transcript and bill of exceptions, the material facts in this case are substantially as follows:

John H. Fullenwider departed this life on or about the 18th day of April, 1906, leaving as his heirs two sons, John G. and H. A. Fullenwider, a daughter, Julia Machen, and his widow, Isabella Fullenwider.

The elder Fullenwider left considerable property, but was heavily in debt. Among his liabilities there was a note at the bank for something more than seven hundred dollars, which was occasioning the said John H. Fullenwider considerable worry. In order to relieve their father from this worry, and at his request, the sons, John G. and H. A., took up the father's note, giving their own note to the bank in lieu thereof. Thereafter, and after the death of the father, the sons, from time to time, renewed the note which they gave to the bank, or rather, gave in lieu of their own note various renewal notes, which renewal notes covered

usually the original note with accrued interest. Finally this obligation to the bank was paid in full by the sons, and out of that transaction, as it will appear later, this controversy grew.

John H. Fullenwider, at the time of his death, left a will, in which he named his said sons as executors, with the request that they be not required to give bond, and with the further request that they act without compensation.

By virtue of an agreement entered into between all the parties interested in the estate of the elder Fullenwider, including the creditors, the will was not seasonably offered for probate, and the two sons, as a part of said agreement, undertook the management of the estate for the purpose of paying the debts of their late father, and saving, if possible, something for his heirs. In this arduous undertaking the sons appear to have been successful, and so far as we can discover, satisfied everybody interested in the estate, save the daughter, defendant in error here.

Some four years after the death of their father the mother, Isabella, also died, leaving a will substantially in form like that left by her husband; that is to say, she named the two sons as executors, with the request that they be not required to give bond, and that they act without compensation.

A few months after the death of the mother both wills were presented for probate. The daughter interposed objections to the sons acting as executors of either will. The ground for her objections do not appear in the record. Apparently the sons waived their right to act as executors, and C. S. Conant, one of the plaintiffs in error here, was named as administrator, with will annexed, of both estates, his appointment being dated November 15th, 1910.

A few months thereafter John G. and H. A. Fullenwider were required, by order of the County Court, to make an accounting of their acts and doings with reference to the two estates during the time they managed the same.

The record does not disclose whether the probate court acted *sua sponte* or upon motion of some interested party. At any rate, the sons promptly complied with the order of the probate court, and filed their report, covering a period of almost five years, and involving expenditures of almost seven thousand dollars, and receipts exceeding that sum.

Defendant in error, through her attorney, filed numerous objections to the approval of the report made by her brothers, each and every one of which was overruled by the probate judge, save as to the transaction concerning the note at the bank, to which we have already referred. As to this item the court, upon request of the defendant in error, ordered that a citation be issued and served upon the sons, requiring them to explain the disposition of this particular item in their report, it not being fully explained therein. Thereupon, without protest or objection, the sons made return to this citation, setting up the entire transaction pertaining to this note in great detail. The daughter promptly filed what she styled her replication, consisting, first, of a general denial, and, second, of a general demurrer, and praying that an order be entered requiring her brothers to forthwith pay into court the entire amount represented by the aforesaid note, together with all accrued interest which they had paid from time to time, and asking that in default thereof the brothers be adjudged to be in contempt, and that they be confined in the common jail until they had paid said sum into court.

A hearing was had on the issues thus joined, resulting in an order by the probate court overruling the objections of defendant in error *in toto*, and approving the accounting made by the brothers with respect to the one item in dispute, all other items having been previously approved. From this judgment or order of the probate court Mrs. Machen appealed to the District Court, and after various proceedings in that court, which it is not necessary to set forth here, a hearing was finally had to the court without

a jury, resulting in an order or decree of that court disapproving the allowance of the disputed item, from which order the case is here by writ of error.

The District Court appears to have based its judgment or decree disallowing the said item solely upon the ground that the respondents had "never presented to the County Court for payment, within the period of one year, nor at any time except indirectly through said accounting * * * said note, either the original or a copy of same, within a period of one year after the administrator was appointed and qualified or at any time thereafter." In this we think the learned trial judge committed error. As we view the transaction, the sons held no note against the estate, hence could not present the same for payment. The note of the father had been fully paid in his life time by the sons taking up the same and giving their own note to the bank in lieu thereof. The record discloses that shortly after this transaction the father died and his sons, upon the request of all the heirs and the creditors, managed the father's estate, without bond and without compensation; that they received and paid out large sums of money while so acting under this agreement. The sum which they allowed themselves in their report on account of the bank transaction referred to, in our judgment, differs in no respect from any other credit which they allowed themselves in their report. All parties interested appear to be entirely satisfied with every one of the many transactions of the sons during the long years they managed the estate, save and except as to the one item at the bank, and no one interested is protesting as to that save the sister. Her interest in it would be, apparently, but one-third of the amount, or less than three hundred fifty dollars.

This item was contained in a report made to the probate court under oath, and, finally, upon request or motion of the defendant in error, the entire transaction at the bank was set forth in a special return to a citation which she

caused to be issued against her brothers. On hearing, this return, or answer, to the citation was approved by the probate court.

Again, in the District Court we find no evidence whatever was offered impeaching the good faith of the brothers, and the District Court based its disallowance of the particular item here under consideration solely upon grounds of the most technical character.

It should be remembered that the sworn report or accounting made by the sons of the probate court was filed within the year following the appointment of the administrator; indeed, was filed within a very few months after said appointment.

We think, under all the circumstances here detailed, this satisfied the statute, and that the defendant in error's objections are without merit. For the reasons stated the judgment of the District Court is reversed, and the case is remanded to that court with instructions to enter judgment in favor of the plaintiffs in error, and for such other proceedings as may be necessary to properly complete the records of the probate court.

Certain questions debated in the briefs we have not found it necessary to determine or consider. Moreover, the right of defendant in error to appeal from the order of the County Court, approving the report of her brothers, to the District Court, is, at least, doubtful, but inasmuch as this question has not been raised by either side, we have considered the judgment of the District Court as though the right of appeal was unquestionable.

Reversed and Remanded with Directions.

[No. 4124.]

GEIJSBEEK v. MARTIN.

1. CIVIL ACTION—*When Expense of Defending Recoverable.* In general no action is allowed for the expense of defending a civil action. Instances have occurred where, the action being vexatious and without any reasonable cause, a recovery has been permitted against either the party suing, or the one who instigated the suit. (317.)

2. —— *Pleading.*. The complaint must allege that the action was vexatious, and without reasonable or probable cause. In the absence of such allegation there can be no recovery. (317.)

3. —— *Damages——Proximate Cause.* The complaint alleged that defendant, an attorney, employed plaintiff to audit the books of a cigar company, not to ascertain the company's condition, but with the secret purpose, concealed from plaintiff, to found upon plaintiff's report a criminal accusation against the manager of the company, and to use plaintiff in the prosecution of such accusation; that plaintiff having made a report of his examination, defendant, by means thereof, induced the district attorney to procure an indictment against the manager, and appearing for the people at the trial of such indictment, so conducted himself as to cause the accused manager to believe that plaintiff had instigated the prosecution; that in this belief the manager, being acquitted of the charge laid against him, instituted against plaintiff an action for malicious prosecution; that plaintiff defeated such action, but expended $1,000 in the defense thereof, which he demanded of defendant. *Held*, that the misconceived action of the manager was the direct and proximate cause of plaintiff's loss, and was not the natural consequence of what was alleged against defendant. (320.)

4. FRAUD—*A Secret Purpose in Employing One to do a Lawful Act*, in a lawful manner, is not a fraud upon the person employed. (320.)

Error to Denver District Court. HON. JOHN A. PERRY, Judge.

MESSRS. D. L. WEBB, J. B. GEIJSBEEK, for plaintiff in error.

MESSRS. BAPTISTE D. ZIMMERMANN, BERT MARTIN, for defendant in error.

MORGAN, J.

Plaintiff Geijsbeek sued Martin to recover $1000 expenses incurred in defending a lawsuit brought against him by Gahan, alleging that Martin's fraud and deceit caused Gahan to sue him. A general demurrer to his complaint was sustained, and judgment entered against him. He now asks a reversal, which is denied for the following reasons:

First, there are comparatively few instances where an action will lie for expenses incurred in defending a civil action. Such loss is, as a general rule, *damnum absque injuria.* See Weeks' work on that subject, Sec. 70. It is one of the sacrifices any citizen may be called upon to make to organized society. However, instances have arisen, and others may arise, where a civil action may be shown to have been so extremely vexatious and unfounded, and so destitute of any reasonable or probable cause, that the party sued should recover his expenses from the party suing, or from the one who induced or caused the suit. *Closson v. Staples,* 42 Vt., 209, 1 Am. Rep., 316.

The plaintiff did not allege that the suit in which he incurred the expenses was vexatiously brought, nor that it was destitute of any reasonable or probable cause, and the lower court sustained the demurrer for such reason. Such ruling seems to be correct. *Flight v. Leman,* 4 Q. B., 883; *White v. Dingley,* 4 Mass., 432; *Dendy v. Russell,* 84 Kan., 377, 114 Pac., 239, 240. In the latter case the court said:

"There is nothing to suggest that the former action was not prosecuted in good faith, and the answer nowhere alleged malice or want of probable cause. Where a person has been sued in a civil action he cannot, in the absence of a showing of malice, maintain another action to recover damages on the ground that the first action should not have been brought. *Deere v. Spatz,* 78 Kan., 786, 99 Pac., 221, 20 L. R. A. (N. S.), 492. See also *Lake v. Hargis,* 82 Kan., 711, 109 Pac., 670." [30 L. R. A. (N. S.), 366.]

It seems that the foregoing rule ought to be decisive herein, even though the plaintiff did not sue the one who

brought the suit against him and directly caused the expenses, but sued Martin, who he alleges induced and caused the suit by fraud and deceit perpetrated upon him, the reasonable and proximate result of which, it is contended, was the suit and the loss incurred in defending it. If plaintiff could not recover from the one who brought the suit, it does not seem that he ought to recover from Martin. However, he contends, in effect, that such rule is not applicable. Nevertheless, it does appear from the complaint that whatever Martin may have done wrongfully, or may have wrongfully omitted to do, through fraud or otherwise, resulted in nothing but the loss of the expenses aforesaid; and as "fraud gives no action in any case without damage," and as the loss sued for was not damage in law, the same conclusion follows that the loss was *damnum absque injuria*, and cannot be recovered under the allegations of the complaint, because it is not alleged that the suit against the plaintiff was vexatiously brought or vexatiously induced.

Second, it is contended that the rule of law that "a man is presumed to intend the natural consequences of his acts," is applicable to the facts alleged; and that as the expenses sued for were the natural or proximate result of Martin's fraudulent acts, he is liable for damages to the extent of the expenses sued for, notwithstanding the rule first announced. It seems impossible to disconnect this contention from such rule, but, aside from the application thereof, the fraud and deceit alleged was not the proximate cause of plaintiff's loss, nor was the loss the natural consequence thereof, from the facts alleged.

The complaint attempts to state a cause of action *ex delicto*, and the fraud consisted in charging that Martin "framed and devised in his mind a scheme to use plaintiff as an instrument to persecute Gahan, the manager of a cigar company, into the payment of money" he owed to the cigar company, so that Martin could collect a claim he had, as administrator of an estate, against the cigar company;

and charging that Martin, pursuant to said fraudulent scheme, and concealing his real purpose, employed plaintiff to audit the books of the cigar company, not in good faith, to ascertain the said company's financial condition, but for the purpose of discovering some ground to prosecute the said manager for embezzlement of the company's funds, and thereby to coerce him into the payment of what he owed the company, and to use the plaintiff as the instrument to push the prosecution. The complaint further states that plaintiff, induced by Martin's fraudulent concealment, audited the books and made a report thereof; that Martin took the report to the district attorney, and induced that officer to indict the manager for embezzlement; that Martin so framed his interrogatories at the trial as to indicate to the accused manager that plaintiff had instigated the prosecution; that the accused was acquitted; that thereafter he sued the plaintiff and Martin and Morris, who had assisted in auditing the books, and who had verified the criminal complaint, for damages for malicious prosecution; that judgment was rendered in favor of the defendants, and that plaintiff expended $1000 in defending said suit. These allegations refute the theory that plaintiff's loss was the reasonable or the proximate result of Martin's acts. The allegation that the accused lost his suit against the plaintiff carries the presumption that the suit was without merit, and that the criminal prosecution of the accused was without malice, and with probable cause; consequently the natural result of Martin's acts would have been that no suit would have been brought by the accused. It would not be natural, but unnatural, that the accused would bring such a suit. The allegations disclose, furthermore, that the loss was too remote to be the proximate result of Martin's acts.

There was an intervening cause—Gahan's misconceived suit against the plaintiff (the actual and proximate cause of plaintiff's loss)—which, as has been shown, was not the

natural consequence thereof. Weeks' *Damnum Absque Injuria*, secs. 116, 117, 118.

In the case of *Clark v. Wallace*, 51 Colo., 437, 439, 118 Pac., 973, Ann. Cas., 1913, B. 349, our Supreme Court said:

" 'The rule is general that a person is not to be held responsible in damages for the remote consequences of his act, or indeed for any but those which are proximate or natural.' 8 Am. & Eng. Ency. of Law, 561. In *D. & R. G. R. R. Co. v. Sipes*, 26 Colo., 17, 55 Pac., 1093, it is said that proximate cause is 'that cause which, in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which the result would not have occurred;' or 'that cause which immediately precedes and directly produces an effect, as distinguished from a remote, mediate, or predisposing cause.'

Whether an act was the proximate cause of damage is ordinarily a question for the jury, but when the facts are undisputed and are susceptible of but one inference, the question is one of law for the court. *D. & R. G. R. R. Co. v. Sipes, supra.*"

Third, it is extremely doubtful, also, whether the complaint sets forth any acts or omissions of Martin that constitute a fraud upon the plaintiff. The charge is that Martin concealed his real purpose in employing plaintiff to audit the books, which was to use him as an instrument to prosecute Gahan, and that, if he had known Martin's real purpose, he would not have audited the books. Plaintiff was lawfully employed to do a lawful thing in a lawful way, and the fact that Martin concealed his real purpose would not be a fraud upon plaintiff. Martin was under no legal duty under such circumstances to inform plaintiff of his purpose in employing him. And, although plaintiff alleges that Martin's real and concealed purpose was to use plaintiff as an instrument to "persecute" Gahan, yet he also alleges that Martin made it appear to the district attorney, from plaintiff's auditing report, that Gahan was guilty of

embezzlement, and that Gahan, though acquitted, lost his suit against plaintiff, Martin and Morris, for damages for malicious prosecution, thus, in effect, alleging that there was probable cause of Gahan's guilt, and thus disclosing by his complaint that plaintiff was not used to "persecute," but only to prosecute, Gahan. Such use of plaintiff was not a fraud upon him, where it appears that there was probable cause of Gahan's guilt.

Finding no reversible error in the proceedings in the lower court, the judgment is affirmed.

[No. 4140.]

RIVERSIDE RESERVOIR AND LAND COMPANY V. SMYLIE.

NEW TRIAL—*Excessive Damages—Weight of Evidence.* An award of excessive damages not supported by the weight of the evidence vacated.

Error to Weld District Court. HON. NEIL F. GRAHAM, Judge.

MR. THOMAS M. MORROW, for plaintiff in error.

MR. JOHN T. JACOBS, for defendant in error.

BELL, Judge.

It appears that defendant in error, plaintiff in the trial court, hereinafter called plaintiff, in the year 1906 owned 250 acres, more or less, of low bottom land lying along the South Platte River in Weld County, Colorado, and some 750 acres, more or less, of sand-hill pasture lands adjoining; that plaintiff in error, defendant in the trial court, hereinafter called defendant, constructed the Riverside Reservoir in close proximity to said bottom land, and impounded a

large body of water therein for irrigation purposes; that about the years 1907 and 1908 the waters from said reservoir so percolated and seeped into and over large portions of said bottom land as to render the same unfit for the production of ordinary crops thereon; and for this injury plaintiff brought this action, alleging, among other things, in her original complaint that

"the waters stored in said Riverside reservoir by defendant have escaped therefrom and seeped, percolated and filtrated through the soil of said reservoir, and have passed to, and in on and over the lands of plaintiff, covering same with said seepage waters so escaping as aforesaid, and seeping and flooding 250 acres of plaintiff's said lands, thereby rendering the same unfit for farming purposes, souring said lands and causing alkili to appear thereon, injuring the improvements thereof, destroying the orchard growing thereon, compelling this plaintiff to construct expensive drainage ditches to remove said seepage waters, and causing a depreciation in the value of said premises in the sum and amount of $12,500.

"That the seeping of said land as aforesaid has also prevented the use of said 250 acres of land by plaintiff for farming purposes for a period of three years to the further damage of plaintiff in the sum and amount of $12,000."

Defendant, in its answer, denies any injury to the premises, and alleges a complete settlement of all matters set up in the complaint. The issues were tried to a jury, and resulted in a verdict in favor of the plaintiff in the sum of $21,750, upon which judgment was accordingly entered.

Plaintiff introduced no evidence whatever in support of the allegation in her complaint, whereby she seeks to recover the sum of $12,000 for a deprivation of the use of said premises for farming purposes for a period of three years, and the verdict of the jury, therefore, awards her $9,250 for a depreciation of the value of the premises in

excess of the *ad damnum* or claim made therefor in the complaint. After the return of the verdict, she asked and obtained leave of court, over the objection of defendant, to amend her complaint so as to conform to the verdict, and alleged the damages as to the market value of the farm at the sum of $21,750.

We think assignment of error number 23, alleging that the damages allowed by the jury are excessive, is well taken; but as the case may be retried, we do not desire to comment upon the evidence, further than to say that it was very indefinite, uncertain and insufficient upon all the issues submitted to the jury; and as the verdict is excessive and not supported by the weight of the evidence, the judgment based thereon is reversed and the case remanded.

Reversed and remanded.

[No. 4146.]

PEDEN V. BIRKLE.

1. FALSE REPRESENTATIONS—*As to Legal Effect of a Document*, of which the party complaining has the same opportunity to judge, as the party making the representation, and as to which there is time to investigate, and take counsel, afford no action. (324.)

2. CHATTEL MORTGAGE—*Defective Acknowledgment.* A chattel mortgage acknowledged before a notary public, but to the certificate of which acknowledgment the notary has failed to affix his seal, is valid between the parties thereto. (324.)

Error to Weld District Court. HON. NEIL F. GRAHAM, Judge.

MR. L. W. NEWBY, for plaintiff in error.

MR. ROBERT E. WINBOURNE, for defendant in error.

KING, J., delivered the opinion of the court.

Plaintiff Birkle brought his suit to recover from defendant Peden the amount of a check which defendant had drawn on the Farmers National Bank of Longmont, payable to plaintiff, and which on presentation was dishonored because defendant had revoked the check, or stopped payment thereof. On trial to the court, without jury, judgment was rendered in favor of plaintiff.

Defendant pleaded several affirmative defenses, in substance that the indebtedness for which the check was given had prior thereto been satisfied by a new note secured by chattel mortgage; that the check had been obtained by false representations, which defendant believed and upon which he relied; and that the check had been obtained by duress consisting of threats of prosecution. The evidence shows clearly that the new note and chattel mortgage were not given in payment and satisfaction of the old note, but as a renewal, and with the understanding that the first mortgage was to be foreclosed upon certain property that had been sold by the mortgagor, subject thereto, and omitted from the new mortgage, and that the proceeds of foreclosure should be applied to reduce the new note. The representations alleged to have been made which were said to be false consisted of a statement that the chattel mortgage which plaintiff was foreclosing was good, whereas, the notary, in certifying the acknowledgment to said chattel mortgage, had failed to affix his seal thereto. The proof discloses that the mortgage was shown to defendant before he gave the check, and a copy of the mortgage was left with him. His opportunity to judge of the validity of the mortgage was equal to that of the plaintiff, and he had ample time to investigate as to the law, and take advice if he saw fit. Moreover, the mortgage was good as between the parties thereto, and there is nothing to show or indicate that the plaintiff knowingly misrepresented the legal suf-

ficiency of the instrument as to third parties. The alleged duress consisted of statements said to have been made by one Fox, manager of a mining company which had bought from defendant some mules included in the said mortgage, and which had been seized by the mortgagee, to the effect that unless defendant settled the matter within forty-eight hours, so that the mining company would not lose, defendant would be prosecuted. The proof of duress is not strong enough to warrant this court in interfering with the finding of the trial judge, before whom the witnesses appeared.

Finding no error, the judgment will be affirmed.

Affirmed.

[No. 4150.]

NEWMAN ET AL. v. TIBBITTS.

1. PRINCIPAL AND AGENT—*Authority to Convey Lands.* Under Rev. Stat., sec. 2660, authority to convey lands can be conferred only by writing. (329.)

2. —— *Ratification,* of the acts of the agent who assumes to convey the lands of his principal, without written authority, can be effected only by writing. (329.)

A conveyance by the principal to a third person is an effectual repudiation of the act of the agent. (330.)

3. FORFEITURE—*One Assuming to Declare, Must be Able to Perform on His Own Part.* Plaintiff held the promissory note of the Newmans secured by deed of trust of lands. Default having been made in the payment of interest, an agreement was entered into extending the time therefor, and providing that if the conditions thereof were not performed by defendants, by a date specified, upon the forfeiture so resulting a warranty deed of defendants re-conveying the premises, and then deposited in escrow, should be delivered to plaintiff in full satisfaction of defendants' promissory note. Defendants failed in the performance of the conditions of this agreement, and conveyed the premises to a third party. The deed of defendants, so deposited in escrow, had been delivered to plaintiff. Plaintiff prayed confirmation of this conveyance, the annulment of the deed of defendants to the third party, and possession of the lands. It appearing that plaintiff had sold and assigned the note of defendants to a third person, it was held

that he had thereby disabled himself to perform his undertaking in respect thereto and for this, among other reasons, was not entitled to the relief prayed. (330.)

4. EVIDENCE—*Burden of Proof.* It seems that whoever assails a conveyance, as accepted with notice of the rights of another, or with notice of a fraudulent intent on the part of a grantor in such conveyance, has the burden of proving these allegations. (329.)

5. PARTIES—*Indispensable.* Where the plaintiff relies upon a contract by the terms of which the defendants are entitled to the surrender of a promissory note, then held by the plaintiff, and it appears that plaintiff has assigned the note to a third person, the assignee is an indispensable party. (330.)

6. PLEADINGS—*Construed.* The complaint relied upon an agreement, and a conveyance of lands, executed in the name of one of the defendants, by an attorney in fact. The answer denied the authority of the alleged attorney in fact, not pleading the statute of frauds. Parol evidence in denial of the authority was received below, and considered in the court of review. (329, 330.)

Error to Garfield District Court. HON. JOHN T. SHUMATE, Judge.

MR. E. V. HOLLAND, MR. J. W. BELL, for plaintiffs in error.

MR. EDWIN C. KINGSBURY, for defendant in error.

KING, J., delivered the opinion of the court.

In this opinion Charles H. Tibbitts, the defendant in error, will be called plaintiff, and the plaintiffs in error defendants, as in the trial court.

Action was brought by plaintiff (a) to obtain a decree validating and confirming a certain contract and warranty deed made March 10, 1913, by John W. Newman, and by Joseph W. Newman, representing himself to be attorney in fact for Edith M. Newman, and to estop her from denying the authority of said Newman to act as her attorney in fact in making the said deed and contract; (b) to set at naught and nullify a certain warranty deed made August 26, 1913, by defendants John W. and Edith M. Newman to

defendant Jacob Hess; (c) for right of possession of the premises described in said deeds, and of which the defendants were in possession; (d) for $1,000 damages, and general relief. Defendants answered, and in addition to praying for denial of plaintiff's demands, asked affirmatively for an order annulling the contract and warranty deed which plaintiff asked to have affirmed, and that the deed to Jacob Hess be confirmed.

Judgment was for plaintiff for $1 damages, and all other relief prayed for.

The evidence shows that in February, 1908, the plaintiff sold and conveyed to John W. Newman and Edith M. Newman certain parcels of land, with water rights, situate in Garfield County, and at that time took back a deed of trust to secure said defendants' note in the sum of $6,750, payable on or before ten years from that date, with interest payable annually; that prior to March 10, 1913, a part of the principal had been paid, and interest to that date, with the exception of about $300 due February 1st; that on March 10th, because of said delinquent interest, the plaintiff, the defendant John W. Newman, and the defendant Joseph W. Newman (father of John W. and Edith M.), had some negotiations which resulted in an agreement by which the time of payment of principal and interest was extended to September 1, 1913, under certain conditions in the agreement specified, and providing that if some of the options therein were not exercised and other conditions complied with by the defendants by September 1st, the contract would be null and void; that upon forfeiture a certain warranty deed of the same date, purporting to be executed by John W. Newman and Edith M. Newman, by her father as attorney in fact, reconveying the said premises to plaintiff, should be delivered to plaintiff, and upon such delivery become an absolute conveyance of the property and in full satisfaction of the deed of trust and note aforesaid, and also providing that five days' notice by registered mail should be given by

plaintiff of his intention to declare a forfeiture. The agreement and the deed were signed by John W. Newman in person, and also signed as follows: "Edith M. Newman, by Joseph W. Newman, Attorney in Fact," and the acknowledgement so taken. The agreement and deed were deposited as escrows. On or about September 1st defendant Joseph W. Newman notified the plaintiff that they were securing a loan of $5,000, with which to make the payments required, but could not make the arrangements before September 10th; whereupon plaintiff, for an additional consideration, agreed to extend the time until the abstract could be examined and approved by Mr. Darrow, an attorney. The $5,000 was deposited with Mr. Darrow, with instructions to make the loan. Upon examining the abstract, he found the escrow agreement on record, and required the plaintiff to release the same, as a prerequisite to approval of the abstract, which plaintiff refused to do. About September 3rd the plaintiff, by registered mail, notified the defendant John W. Newman that the contract had been forfeited, and on September 17th took from the escrow holder, and recorded, the agreement and deed. The evidence also shows that on or about the 8th or 9th of September plaintiff sold, assigned and delivered the note secured by deed of trust on the land to one L. F. Grace, who still holds the same; and that on or about August 26th defendants John W. and Edith M. Newman executed and delivered their warranty deed, whereby they conveyed the said land and water rights to defendant Jacob Hess, and that deed was placed on record.

The pleadings are unsatisfactory and ambiguous, and in some respects doubtful and uncertain as to issues intended to be made. The complaint and the exhibits referred to allege and show that the contract for the sale of Edith M. Newman's interest in said lands, and the deed purporting to convey such interest, were signed by Joseph W. Newman, purporting to act as her attorney in fact, and the complaint alleges that he represented himself to be her agent

and attorney, and acted as her agent, but does not allege that he was her attorney in fact. The defense does not in specific terms plead the statute of frauds, but denies that said Joseph W. Newman was the agent or attorney of Edith M. Newman, or represented himself to be her agent and attorney, and acted as her agent, but does not allege that he was her attorney in fact. The defense does not in specific terms plead the statute of frauds, but denies that said Joseph W. Newman was the agent or attorney of Edith M. Newman, or represented himself to be such, and alleges that he had no "direct authority" to execute the instruments. On trial both he and his daughter positively denied any authority, verbal or written, for him to execute either instrument; and there is a total absence of evidence tending to prove any written authority. The complaint also alleges that the deed from defendants to Hess was made for the purpose of defrauding the plaintiff, and that Hess knew of the arrangements made in the escrow and deed, and the court seems to have so held. There is a total absence of evidence showing that Hess had such knowledge at the time the deed to him was executed, delivered and recorded, and there is also a total absence of evidence showing or tending to show that he had knowledge or notice of the alleged fraudulent intent on the part of his grantors, if such intent in fact existed.

1. The contract and deed, executed by Joseph W. Newman, professing to act as attorney in fact for his daughter, were void under the statute of frauds, so far as she was concerned, because he was not authorized in writing to execute the same. *Clement v. Major*, 1 Colo. App., 297, 302, 29 Pac., 19; *Hagerman v. Bates*, 5 Colo. App., 391, 405, 38 Pac., 1100. She did not ratify the void instruments, or either of them, in writing, and there is no satisfactory evidence that she otherwise ratified either of them. Ratification in writing was necessary. *People's M. & M. Co. v. Central C. M. Corporation*, 20 Colo. App., 561, 80 Pac., 479.

If it be assumed that she knew of the deed executed by her father, which knowledge she denies, nevertheless the deed which she made on August 26th to Jacob Hess was a complete repudiation of that deed, and such repudiation by deed took place five days before default in conditions of the contract, and twenty-two days before an attempt was made to enforce the forfeiture. Under the circumstances we think the court had no authority in law or equity for holding the unauthorized deed to be a good conveyance as to the interest of Edith M. Newman.

2. The plaintiff, before he declared a forfeiture of the escrow agreement and obtained the warranty deed from the escrow holder, sold and assigned the note and deed of trust, which, according to the agreement, were to be cancelled upon delivery of the deed, thereby making it impossible for him to keep that part of the agreement. L. F. Grace, the assignee of the note, is not a party to this suit. The note was not tendered in this proceeding, nor was a release of the deed of trust. The court was without power to make a decree which would be binding on Grace, inasmuch as he was not a party to the proceeding. He was an indispensable party to a full determination of the suit, and therefore the general rule as to waiver of defect of parties does not apply. *Peck v. Peck,* 33 Colo., 421, 425, 80 Pac., 1063; *Colo. St. Bk. of Durango v. Davidson,* 7 Colo. App., 91, 96, 42 Pac., 687; 2 Cyc., 687, 784; 31 Cyc., 742, note 6. A condition unusual in suits of this kind is shown to exist, in that the plaintiff, by assigning the note and deed of trust, put it out of his power to keep the contract, and the defendant, by making the deed to Hess, put it out of their power to keep it. Neither of them has tendered performance, except as plaintiff tendered it by his complaint, and he has not shown his ability to perform.

3. There is another reason for denying the equitable relief prayed for, in the fact that there was and is an adequate remedy at law by foreclosure of the deed of trust,

which would amply protect the interests of all parties. Plaintiff could thereby secure his debt or the land; defendant Hess could redeem from the trust deed sale, and thus save the amount he had paid the other defendants on the purchase price; and the Newmans would have an opportunity to make payment of the debt before foreclosure, or redeem within the statutory time if Hess failed to protect them from his assumption of the trust deed. It is true, the remedy by foreclosure is not as speedy as the remedy provided in the contract, which contemplated immediate possession on forfeiture; but when all the circumstances are considered, we think the plaintiff is not in a position to insist upon the court's extending to him the equitable relief prayed for.

Another cause of action, namely, a replevin suit for personal property, including crops, was consolidated with the one which we have discussed, which will be controlled by our decision in the main case.

The judgment as to both causes of action is reversed and the cause remanded for further proceedings in accordance with the views herein expressed; the costs in this court to be taxed equally to the plaintiffs in error and the defendant in error.

Reversed and remanded.

Decided May 10th, A. D. 1915. Rehearing denied June 14th, A. D. 1915.

[No. 4159.]

YOUNG ET AL. v. UNITED STATES BANK AND TRUST COMPANY.

1. EVIDENCE—*Competency—Letters of Third Person*, are not admissible to establish a promise therein stated to have been made by defendant. (334.)
2. —— *Letters of Party.* The administrator of an attorney brought his action to recover of defendants the fee of the attorney for defending their

nephew upon a criminal charge. The unsigned copy of a letter, found in the letter file of the attorney, addressed to one of the defendants, and demanding payment of the bill, but not shown to have been mailed to or received by the defendant, held not admissible. (334, 335.)

3. —— *Account Books of Party.* The account book of an attorney charging a person named with the attorney's fee for defending a third person under a criminal charge, is not admissible to establish the amount of the fee, or the value of the service, where there is no independent, competent evidence to show the attorney's employment by such third person, and that fact is in issue. (336, 337.)

Error to Mesa District Court. HON. THOMAS J. BLACK, Judge.

MR. N. C. MILLER and MR. HENRY TUPPER, for plaintiffs in error.

MESSRS. BULLOCK & WALKER, for defendant in error.

CUNNINGHAM, P. J.

We shall refer to the plaintiffs in error here as defendants, and the defendant in error as plaintiff.

The facts out of which this controversy grew are simple. James S. Carnahan, an attorney at law, and a member of the firm of Carnahan & Van Hoorebeke, was employed to defend one Clare Young, who stood charged, in the District Court of Montrose County, with a serious offense. Carnahan rendered the services for which he was employed, and there remained due his firm a balance for such service, upon which, after the death of both members of the firm, this action was brought against the defendants.

There is but a single question for our determination, namely, are the defendants, or any of them, liable for the balance justly due on the services rendered by Carnahan for the said Clare Young? The defendants are uncles of Clare Young.

The action was brought upon the theory that Carnahan was employed by the defendants, and the trial court so found, and rendered judgment accordingly. It is contended in this court, on behalf of plaintiff, that the record before us supports the findings and judgment of the trial court.

Except upon formal matters Mrs. R. A. Young, sister-in-law of the defendants, and mother of Clare Young, for whom the services were rendered, was the only witness called by the plaintiff. She testified unequivocally that none of the defendants ever agreed with her that they would pay or become responsible for Judge Carnahan's fee, and she further testified that while she had always intended to employ Judge Carnahan, or have him defend her son, that she was obliged, because of illness in her family, to leave the arrangements for his employment with her brother-in-law, Lafe Young, who, she says, represented her in his negotiations with Judge Carnahan. It appears that Judge Carnahan's retainer was paid at the time he was employed, at any rate, before the trial, and this money, though delivered by Lafe Young to Judge Carnahan, represented a check which Mrs. R. A. Young had sent Lafe for that purpose.

Aside from Mrs. Young's testimony, to which we have already referred, the only other evidence offered on behalf of plaintiff consists of the day-book of the law firm of Carnahan and Van Hoorebeke, two letters written by Mrs. R. A. Young, one to Judge Carnahan, and one to his widow, and a purported carbon copy of a letter which plaintiff insists was written and mailed to the defendant, Lafe Young. The admissibility of each of the aforesaid exhibits was challenged on the trial by apt objections, and our determination of the case must turn entirely upon their admissibility.

In her letter to Judge Carnahan Mrs. R. A. Young says:

"Lafe told me that if I would raise the retaining fee, $300, he and the other boys would pay your expenses during Clare's trial."

This is the strongest, if not the only, sentence in Mrs. Young's short letter, which, in any way, tends to bind the defendants. It is too clear to justify discussion that liability cannot be fixed upon these defendants, or any of them, by evidence of this sort.

The second letter, written by Mrs. Young to Mrs. Carnahan, and which was also admitted in evidence, contains nothing whatever which, in the remotest degree, tends to fix liability upon the defendants, or any of them.

From what we have said it is apparent that the letters of Mrs. R. A. Young were without probative value, and the objection to their admission ought to have been sustained.

Exhibit "E," which was offered and admitted, appears to be an unsigned carbon copy of a letter written by Judge Carnahan to Lafe Young. Shortly before the trial this letter was found in the letter file of Judge Carnahan's old firm. From this copy it appears that Carnahan wrote Lafe Young a letter, addressing him at Fruita, Colorado, Carnahan's office being in Grand Junction. In this letter Young was reminded that in a previous conversation he (Young) had had with Carnahan at the latter's office, Young had repudiated any responsibility for the balance due Carnahan. The letter is too lengthy to be quoted here, but therein Judge Carnahan insists that Young and his brothers must pay the balance of his fee or that suit would be entered against them and their sister-in-law, Mrs. R. A. Young.

The only evidence that this letter was ever mailed was the testimony of Mr. Griffith, who succeeded Van Hoorebeke as a partner of Judge Carnahan. Griffith testified that the custom of the office was that letters were dictated to the stenographer, who made the original and one carbon copy, and every evening about 5 o'clock the originals were presented to the person who dictated them and they were signed, stamped and mailed, the carbon being put in a letter file.

The stenographer was not called, nor does there appear any explanation for her absence from the trial as a witness. The carbon copy contained the initials of Mr. Griffith, who was a member of the firm at the date it bore, thus indicating, as he says, that he had dictated the letter, but he denied having done so, and stated that the stenographer must have been in error. There was no proof as to where Lafe Young was living at the date the letter was written, or that he ever received the letter, or that the original was not returned because uncalled for. On the stand Young denied all knowledge or recollection of having received such a letter. There was clearly no sufficient foundation for the admission of this exhibit, hence the same should have been excluded for that reason, if for no other.

The only evidence offered or admitted in the case which we have not already considered is the day-book of the firm of Carnahan and Van Hoorebeke, showing charges made against "Young Bros.," "Ed Young and Lafe Young," "Lou Young, Lafe Young and Ed Young, Dr. to trial Clare Young," and credits to "Lafe Young, retainer fee for Clare Young," and other charges and credits of similar character. The question of the admissibility of the aforesaid day-book is debated in the briefs with unusual skill. On the trial (which was to the court without a jury) the learned judge, when the day-book was offered in evidence, made the following statement:

"I am satisfied that the rule in cases of this kind is that where services were rendered A, or purported to have been rendered A, at the request of B, that standing alone the books of the plaintiff in such case, without evidence tending to show the employment, would not be admissible, but if there is evidence, direct or circumstantial, which shows that B, or tends to show that B, gave the plaintiff to understand that the services were being rendered for him, or that he would pay for them, that then you may turn

to the books as to the value of the service or as to other things which the books may show."

We agree with the view of the trial judge, and shall presently cite numerous authorities in support thereof, but for reasons already stated we are unable to discover in the record any competent evidence or testimony tending to support the exception to which the court refers; that is, tending to prove that any of the defendants gave Judge Carnahan to understand that the services were being rendered for them, or that they, or any of them, would pay for the same. It is not shown by the record that Judge Carnahan ever had any negotiations whatever with Lou or Ed Young, or in any manner ever communicated with them. Exhibit "E," the carbon letter that was introduced, if it is proper to consider it for any purpose, shows that Lafe Young repudiated all responsibility for the debt in a talk he had had with Judge Carnahan, and on the stand he unequivocally denied having ever agreed to pay the debt or any part of it.

The rule as to the admissibility of day-books under circumstances such as we have here under consideration is thus stated by the Supreme Court of Massachusetts in *Kaiser v. Alexander*, 144 Mass., 78, 12 N. E., 209:

"It is settled in this commonwealth that although the books of original entry of a party are ample to prove the sale and delivery of goods, such books are not competent to prove to whom credit was given, where that fact is in issue. *Keith v. Kibbe*, 10 Cush., 35; *Gorman v. Montgomery*, 1 Allen, 416; *Dexter v. Booth*, 2 Allen, 559; *Field v. Thompson*, 119 Mass., 151."

It appears that the rule in Massachusetts, as stated above, has prevailed from an early day, and the rule announced in the Kaiser case, which has been cited with approval by many courts, was adhered to down to the case of *Brooks v. Wilson*, 218 Mass., 205, 105 N. E., 607, decided in 1914, when that court was forced, by a statute adopted the year previous, to recede from its previous policy.

Commenting on the Massachusetts statute, which makes an entry in an account kept in a book admissible in any civil proceedings as evidence of the facts therein stated, the Massachusetts Supreme Court, in the Brooks case, says:

"This is an exception to the general rule as to the admissibility of self-serving statements made by a party to an action in court. Why this exception should have been made is not apparent."

For other authorities supporting the conclusion which we have reached that the day-book offered, in the circumstances of this case, was not admissible, see: *Peck v. Keller*, 76 N. Y., 604; *Churchill v. Hebden*, 32 R. I., 34, 78 Atl., 337; *Marks v. Box*, 54 Ind. App., 487, 103 N. E., 33; *Atlas Shoe Co. v. Bloom*, 209 Mass., 563, 95 N. E., 952; Jones on Evidence (2nd Ed.), Sec. 574; Wigmore on Evidence, Sec. 1540; *Stidger v. McPhee*, 15 Colo. App., 252, 62 Pac., 332.

In the last case cited it was expressly ruled that one cannot prove that credit was given to a particular person by entries made in a tradesman's books.

Reversed.

[No. 4170.]

OLIVER V. WILDER.

1. CONTRACT—*Illegal—Public Policy.* Even in the absence of legislation upon the subject the courts will declare void any contract opposed to sound policy or good morals, either as to the consideration or the thing to be performed. (344.)

In determining whether a particular contract contravenes public policy, the test is not always, or necessarily, what acts were thereby contemplated or the actual result, but rather whether the tendency of the contract is evil. (344.)

In contracts for public supplies consideration of the most efficient and economical mode of meeting the public wants should control. Whatever tends to introduce other elements in the transaction is against public policy. (345.)

In the year 1912 a general election was approaching, at which certain amendments proposed to the constitution were to be submitted. By statute the Secretary of State was required to publish these amendments in not more

than one newspaper in each county, and a maximum fee for such publication, greatly in excess of the actual cost, was prescribed. One Pearce, then Secretary of State, being a candidate at the same election, summoned before him the publishers of three newspapers then published in Conejos County, and in order to induce "the loyal and unstinted support" of these journals "to every nominee on the Democratic ticket," made a contract, letting to the publisher of one of the three papers the publication of the amendments, at the maximum price specified by the statute, the publisher agreeing to divide the amount which he should so receive with the others, giving each one-third thereof. The actual cost of publication was less than $75.00. The amount agreed to be paid therefor, under the arrangement made by the Secretary, and which was actually paid, was nearly $1800.00. *Held* that the contract was void, not only as tending to extravagance and waste in the use of the public moneys, but to debauch the public press, and jeopardize our public institutions. (339, 346-348.)

The court expresses regret that it is unable, in this action, to require the defendant to return to the public treasury the entire sum which he received under the scandalous and illegal agreement, and call the attention of the general assembly to the crying need for legislation which will prohibit the repetition of like misconduct by public officials, with suitable penalties for the infraction of such regulations. (350.)

2. ILLEGAL CONTRACT—*Complaint Not Disclosing.* The rule that if the complaint fails to disclose illegality in the transaction upon which the plaintiff relies, or if the plaintiff does not require the aid of such transactions, the defendant is not allowed to set up an illegal agreement or consideration, to which he was party, is not the law in this jurisdiction. (349.)

Illegality appearing in the evidence is fatal, whether coming from one side or the other.

3. PRECEDENTS—*Effect.* Where by well settled judicial precedents it has been determined that contracts of a particular character are opposed to public policy, this declaration of the law is equal in force to a statute. (344.)

Error to Conejos District Court. HON. A. WATSON MCHENDRIE, Judge.

MESSRS. GOUDY, TWITCHELL & BURKHART, for plaintiff in error.

MR. J. D. PILCHER, MR. JESSE STEPHENSON, for defendant in error.

KING, J., rendered the opinion of the court.

The complaint contains three counts, or causes of action. The first alleges that at the special instance and request of Oliver (plaintiff in error, defendant below) plaintiff printed 3500 copies of certain proposed Constitutional Amendments and Referred Laws, for which the defendant promised to pay plaintiff $101.00; the second alleges that plaintiff was the general manager of The Alamosa Courier, a weekly newspaper published at Alamosa, Conejos County, and that in October and November, 1912, at the special instance and request of defendant, plaintiff published in said newspaper certain legal advertisements known as Constitutional Amendments and Referred Laws, for which publication defendant promised to pay plaintiff $557.17; the third alleges that The LaJara Chronicle was a weekly newspaper published at LaJara, Conejos County, by L. Erl Bigelow, and that Bigelow, at defendant's special instance and request, published in said newspaper the aforesaid Constitutional Amendments and Referred Laws, for which the defendant agreed to pay Bigelow $557.17, and Bigelow assigned his claim to plaintiff.

For answer defendant pleaded a general denial, and that the contracts sued on, if made, were contrary to public policy, and therefore illegal and void, for reasons which will be stated in connection with the proof.

The cause was tried to a jury, and the court seems to have decided the affirmative defense adversely to the defendant, and submitted to the jury only the question as to whether or not Oliver had agreed to pay Wilder and Bigelow for publication of the matter in their papers, and to pay Wilder for printing the aforesaid copies. Upon that issue the jury found for plaintiff in the sum of $1215.34.

In 1912 James B. Pearce was Secretary of State, and as such was charged with the duty, and vested with the authority, to contract for the publication of initiated and referred bills and constitutional amendments to be submitted at the general election to be held in November.

Concerning initiated and referred measures the Constitution provides that:

"The text of all measures to be submitted shall be published as constitutional amendments are published." Section 1, article V, as amended in 1910.

Section 2 of article XIX, in relation to proposed amendments to the Constitution, provides that:

"The Secretary of State shall also cause the said amendment or amendments to be published in full in *not more than one* newspaper of general circulation in each county, for four successive weeks previous to the next general election for members of the general assembly." (Italics ours.)

Section 1423, Gen. Stats., 3934 R. S. '08, 4488 M. A. S. '12, fixes the maximum fees that may be paid for legal advertisements. It further provides that:

"Any public or municipal officer or board created or existing under the laws of this state that has now, or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements, is hereby authorized, subject to other limitations on said authority, now imposed by law, *to agree to pay therefor prices not exceeding said rates.*" (Italics ours.)

Section 4489 M. A. S. '12, 3935 R. S. '08, defines legal advertisements, and contains the following proviso:

"Provided, however, that any contract providing for payment for such notice at a lesser sum than is provided in said act 1423 shall be valid."

Acting presumably under the authority of the foregoing constitutional and statutory provisions, Mr. Pearce, then a candidate on the democratic ticket for re-election, sent a circular letter to the democratic newspapers of the state, reading as follows:

"Dear Sir:

The law governing the publication of constitutional amendments requires that such publication shall be made

under and by authority of the Secretary of State. The time for publication is close at hand, and I am anxious, where two or more democratic newspapers are printed in one county, that the owners of those newspapers should agree on the particular newspaper which shall print the amendments. I am also desirous that there shall be no misunderstanding whatever over those agreements, and that the newspapers which shall be parties to them shall give loyal and unstinted support to every nominee on the democratic ticket—national, state and county.

In furtherance of this general understanding I would appreciate your presence in my office at your first convenience, not later than ten days after next Monday, September 16, when I will go more into detail with you.

Faithfully yours,

James B. Pearce."

Defendant herein (Mr. Oliver) received one of these letters and went to the office of the Secretary of State and made an arrangement with him whereby it was understood that Oliver was to be awarded the contract for such publications in his newspaper at the maximum rate, and that Oliver was to pay The LaJara Chronicle 25% of said contract price. A few minutes after Oliver left the office with that understanding, Pearce wrote and caused to be delivered to Oliver at Denver the following letter:

"A. Oliver,

Denver.

Dear Sir:

Everything off; must make new arrangement for benefit of party in your county relative to printing.

Get Bigelow, Wilder and yourself come to office in morning.

Yours,

James B. Pearce."

Oliver was owner and publisher of The Alamosa Independent, a democratic newspaper having a circulation of

about six or seven hundred. Bigelow's paper, also democratic, had a circulation of perhaps twelve or fourteen hundred. Wilder was not a democrat, and his paper was not democratic, but he and Pearce were friends. His paper had a circulation of approximately twenty-five hundred. In compliance with the letter last quoted, Bigelow, Wilder and Oliver met with Pearce at his office September 24, the next morning after the letter was written. As the result of the conversation that then and there took place, the parties thoroughly understood that the publisher to whom the contract should be awarded must agree to divide the contract price with the other two, and, according to the testimony of Pearce, his deputy, Dillon, Wilder and Bigelow, an oral agreement was there made by which Oliver was to be awarded the contract at the maximum price, which he was to divide with Wilder and Bigelow.

Although by his answer Oliver denied that he made the agreement for, or assented to, such division, and the plaintiff by his reply admitted that Oliver did not so consent, nevertheless in proving plaintiff's case, Pearce and others testified that Pearce insisted that such an agreement be made by and between the three publishrs; that Wilder said one-third would be satisfactory to him, Bigelow said the same, and that Oliver consented thereto. Several witnesses testified that Dillon was called in to take a note of the understanding; that he had had it typewritten and had read it to Wilder, Bigelow and Oliver in the presence of the Secretary of State, and that all three had agreed thereto. That agreement provided that Oliver should be awarded the contract at the maximum price, and that he should divide with the other two, giving each of them one-third. Pursuant to that arrangement, a written contract was made on October 1st, between Pearce and Oliver, which specified the items necesary to be published, and that Oliver would publish the same in four successive issues of The Alamosa

Independent Journal, in accordance with section 1423 aforesaid.

Another matter was discussed at the office of the Secretary of State, which is the foundation for the first cause of action. Wilder offered to print the sheets containing the matter for publication, for the three newspapers, and agreed to furnish them at as low a price as they could be obtained elsewhere. He claimed that Oliver assented thereto. In accordance with that understanding Wilder printed the sheets, but Oliver refused to take them. The Western Newspaper Union furnished the necessary printed matter to Oliver for $69.43. It made a price to Bigelow of $68.75 for his paper. Wilder charged $116 for printing the entire publication, but deducted $15 for press work made unnecessary by Oliver's refusal to take the copies for his paper, and sued for the balance, $101. The actual cost of the legal publication was less than $75. The amount contracted for by the Secretary of State and paid to Oliver was $1782.87, the maximum fee allowed by law. Oliver repudiated the oral agreement, for which reason the Secretary of State withheld the contract price for a time, but finally paid it to Oliver.

1. All contracts in contravention of public policy are void. The principal contention made by defendant in the trial court relied on in this court is that the contracts sued on are contrary to public policy. No other question requires more than a passing notice.

It seems strange that there is not to be found any express legislative inhibition against agreements of this kind, whereby the public policy of the state in that respect is declared. In the absence of such legislation the court, to declare a particular agreement void on the ground that it is opposed to public policy, must find that such contract has a tendency to injure the public, is against the public good, or inconsistent with sound policy and good morals, as to the consideration or thing to be done. But if, by well-settled

judicial precedent, it has been determined that certain contracts tend to injure the public, or that they are inconsistent with sound morality, the law thus declared is equal in force and effect to a statute, and the court should follow it. It is an undoubted principle of the common law that the court will not lend its aid to enforce a contract to do anything which tends to corrupt or contaminate, by improper or sinister influence, the integrity of our social and political institutions. Our own Supreme Court has defined public policy, with respect to the administration of the law, as "that rule of law which declares that no one can lawfully do that which tends to injure the public, or is detrimental to the public good." *Russell v. Courier P. & P. Co.*, 43 Colo., 321, 95 Pac., 936. Public officers in discharging their official duties, should act solely from high considerations of the public welfare, and a desire to faithfully and honestly perform such duties; hence, whether the officer acting is an executive, legislative or judicial officer, the courts condemn every agreement and act, the tendency or object of which is to sully the purity or mislead the judgment of those to whom the high trust is confided, or to substitute for considerations of public duty and welfare considerations based on the moral weakness, personal obligations or cupidity of the officer, or his desire for re-election, or support for some political party. Mechem, Public Officers, Sec. 359; *Tool Co. v. Norris*, 2 Wall., 45, 17 L. Ed., 868; 9 Cyc., 485. In determining whether a given contract contravenes public policy, the test is not always nor necessarily what acts the parties performed or contemplated, in order to fulfill their agreement, or its actual result, but rather whether its tendency is evil. *Russell v. Courier P. & P. Co., supra*, page 326; *Wood v. Casserleigh*, 30 Colo., 287, 71 Pac., 360, 97 Am. St., 178; *Tool Co. v. Norris, supra; McMullen v. Hoffman*, 174 U. S., 638, 43 L. Ed., 117, 19 Sup. Ct., 839; *Richardson v. Crandall*, 48 N. Y., 348; *Atcheson v. Mallon*, 43 N. Y., 147, 3 Am. Rep., 678. Among the contracts generally

denounced as against public policy are those which contemplate the use of improper or sinister influences to procure contracts from the government or heads of departments of the government, for furnishing supplies to, or for the performance of other services for, the public. Greenhood, Public Policy, page 363; Mechem, Public Officers, Sec. 362; *Marshall v. B. & O. R. R. Co.*, 21 U. S., 153, 16 How., 314, 14 L. Ed., 953; *Pendleton v. Asbury*, 104 Mo. App., 723, 78 S. W., 651, and cases heretofore cited. In *Tool Company v. Norris, supra*, page 554, the court announced, as a general principle of the law, that:

"All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds."

It is also there held that all such agreements "are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution." No language at our command can more fitly express the duty of public officials or the tendency of the contract under consideration in the instant case, than the foregoing excerpt from the opinion of Mr. Justice Field. Such being the principle of public policy as sanctioned by the common law and expounded by the ablest jurists, our

conclusion is that the agreement upon which the second and third causes of action are based belongs to that class of contracts the tendency of which is evil and which the courts will not enforce.

2. But the conception we entertain of our duty to the public will not permit us to rest our conclusions solely on the ground that the contract is one of evil tendency. It is in itself palpably vicious and corrupt in conception, consideration and purpose, and necessarily baneful in effect. Indeed it is impossible to accurately predict the vicious results to be apprehended as the natural effect of such an agreement. The letter of the Secretary of State which we have quoted, supplemented by as much of the evidence as is necessary to make the meaning of the letter plain, exposes beyond doubt the unlawful purpose of the agreements solicited by the letter, and the influence or considerations, and, if necessary, coercion, to be used in effectuating that purpose. The letter impresses upon the recipient the fact that the Secretary of State controls the publication and lets the contract therefor, but that in counties where two or more democratic papers are published he is anxious that the owners thereof agree upon one paper to which the contract shall be awarded as required by law, thereby delegating to the newspaper owners the exercise of the discretion in selection which the law entrusts to him alone.

In exchange for this substitution of newspaper owners' agreement in place of the exercise of his own discretion in the selection, Mr. Pearce exacts of the newspapers becoming parties thereto "loyal and unstinted support to every nominee on the democratic ticket—national, state and county." As the law stands, only *one* newspaper in each county can be awarded a contract and paid a contract price, and it does not appear from the letter what consideration the other newspapers were to be offered as an inducement for such an agreement, but that feature was left for determination at the conference in Secretary Pearce's office

to which his letter invited them "in furtherance of this general understanding." When they have so met, they are told, as a condition precedent to a selection of one newspaper, to which the contract shall be awarded, that there must be an agreement between the several parties interested as to a division among themselves of the fees which shall be paid to the one receiving the contract, in consideration of which the fee to be so paid shall be the maximum allowed by statute. In the instant case, when these conditions, considerations and exactions were made known and consented to, the practical effect of the contract entered into was that Oliver agreed to perform all the services required by the Constitution and the law; that is to say, to publish the initiated and referred laws and constitutional amendments for four successive weeks, for $594.27, one-third the maximum fee allowed by law, and that the remaining two-thirds of said sum, to-wit, $1188.54, should be paid to Wilder and Bigelow, ostensibly for making publications which the law neither directed nor permitted to be made at the expense of the state, but actually in consideration of the agreement to support certain candidates, including Mr. Pearce. The fact that the entire sum fixed was to be first paid to Oliver, and that he was to deliver two-thirds thereof to the others, does not make the contract less vicious. It was but a palpable subterfuge which in effect evaded the law while it appeared to comply therewith, and we believe it was entered into with that purpose. We look to the substance of the entire transaction, and not to the empty form of the later written agreement. No judicial precedent cited affords an exact parallel to the circumstances here disclosed. Usually the employment, contract or combination, denounced, has been made by outsiders, to influence, control or affect the actions of the public official, without his knowledge of the intention or of the means used to secure official favor; while here the official offered the corrupt inducement, to which the plaintiff and defendant lent willing ears.

No attempt was made by the Secretary of State to secure the publication at a price less than the maximum, as he is clearly authorized to do under the provisions of Sec. 1423 aforesaid, although he admits that such contract price was known to be excessive; it was, to use his own words, "what we call 'velvet'"; and he admits that the practical effect of the contract he made was to secure the legal publication by Oliver, in Conejos County, for one-third the maximum rate; that in some of the counties of the state it only cost one-fifth of the maximum rate; that it was a matter of common knowledge that the publication could be made for much less than the legal rate; that the condition shown to exist in Conejos County prevailed in every one of the sixty-two counties of the state; and that "each county had one man that had the contract, and then the newspapers got together amongst themselves and arranged the division."

The true construction of the above mentioned constitutional and legislative provisions contemplates that the publication of such measures shall be obtained at a reasonable cost to the people, and any flagrant departure from that construction is in violation of a sound public policy. Whatever the statute permits a public officer to do, manifestly in the interest of the public, it is his duty to perform. Therefore, public officers who fail or refuse under these publication acts to make an honest effort to secure for the people as good terms as they would endeavor to secure for themselves, if they personally had to make the payment, falls short to the extent of carrying out the spirit of the law; and the abuse of these provisions in any manner which tends to increase the reasonable and necessary cost for the work to be done is detrimental to the public and contrary to public policy. Whoever joins in any bargain or arrangement which prevents, or has a tendency to prevent, the public from obtaining such publication at a reasonable cost should

not receive the countenance of the courts, nor their aid in collecting any money so contracted for.

In the face of the letters and the evidence, the purpose, nature, effect and size of the graft is manifest, and amounts in the aggregate to approximately $75,000 in excess of the amount necessary to be paid to procure the publication throughout the state, in the mode and for the time required by the constitution. In addition to the extravagant and unlawful expenditure of the public funds, disclosed by the evidence, it is obvious that the natural result, and the desired purpose of the agreement, was to direct and control the political policy of the public press. If the press may be debauched by such means, then indeed may we regard our social and political institutions in jeopardy at the hands of its legally constituted guardians.

3. Counsel for defendant in error invoke the benefit of a rule sometimes announced, to the effect that if the plaintiff's complaint does not disclose an illegal transaction, or if the plaintiff does not require the aid of such a transaction to establish his case, then the defendant cannot allege and rely upon an illegal or invalid consideration or agreement to which he was a party. A sufficient answer to this contention is that the plaintiff was unable to establish his case without disclosing that it was founded on a consideration and agreement contrary to public policy. Moreover, the rule invoked has been repudiated by the courts of this state, and is not the law in this jurisdiction; *Branham v. Stallings*, 21 Colo., 211, 40 Pac., 396, 52 Am. St., 213; *McConnell v. Schultz*, 23 Colo. App., 194, 199, 128 Pac., 876; *Abernathy v. Wright*, Colo. App., Apr. 12, 1915; in all of which the rule is announced that if, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, the court will render no assistance. In *Coppell v. Hall*, 7 Wall., 542, 558, 10 L. Ed., 244, the court said:

"Wherever an illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case."

4. The application of the rule in this case is in no respect for the protection of the defendant, but solely for the protection of the public. The defendant and the plaintiff are *in pari delicto*. The court regrets its inability in this action to require defendant to return to the treasury of the state the entire sum he received under the illegal agreements.

The court is of the opinion that the agreement sued on in the first cause of action is not so inseparably connected with the other contracts that the vice inherent in the latter necessarily defeats the former also.

In conclusion, we call the attention of the General Assembly to the crying necessity for remedial legislation, which will effectively prevent the recurrence of such practices as are here disclosed, with suitable punishment for infraction of the law in that respect. The judgment is reversed and the cause remanded, with directions to enter judgment for defendant upon the second and third causes of action; and for the plaintiff upon the first cause of action, in the sum of $101.00.

Reversed with Directions.

Decided May 10, A. D. 1915. Rehearing denied June 14, A. D. 1915.

[No. 4039.]

ROBERTS V. LEHL.

1. LANDLORD AND TENANT—*Assignment of Lease—Effect.* The tenant's assignment of the lease under which he holds does not pass to the assignee his right of action for a previous breach of the landlord's covenants. (352.)

2. PLEADING—*Demand of Excessive Damages,* does not impair the plaintiff's right to recover according to the true measure. The complaint is not subject to demurrer. (353.)

3. DAMAGES—*Growing Crops Destroyed.* The measure of damages for the destruction, total or partial, of growing crops, is not what it would cost to raise them, to their condition at the time of loss, or to maturity; but, in the case of annuals, the value thereof immediately before the loss.

The jury should be directed to ascertain the condition of the crop at the time of the loss, what in the ordinary course of things, it would, at maturity, have produced in the market, by the exercise of ordinary care in maturing, harvesting, and marketing; they should be directed to take into account the average yield of like crops, on similar land, in the same season and locality, and to deduct from the market value thus ascertained the ordinary and reasonable expense of maturing, harvesting and marketing.

Where the action is by the tenant against the landlord, the rent reserved being in kind, the verdict should be diminished, proportionately to the share of the land. (355.)

4. —— *Growing Crops Injured but Not Destroyed.* The measure of damages for an injury to an annual crop, not totally destroyed, is the difference between its value immediately before the injury, and immediately thereafter. In ascertaining the future value of the injured crop, the attention of the jury should be directed to the same considerations as in the case of a total loss. (357.

5. —— *Landlord's Failure to Furnish Water.* Where, the lands being arid and irrigation necessary to their cultivation, the landlord fails to provide water therefor, according to his covenant, the tenant is not to plant a crop, depending on the uncertain coming of rain. He is not to assume this risk, and afterwards call upon the landlord to make good the aggravation of his damages, thus occasioned. The measure of his damages in such case is the difference between the rental value of the land, with water, and with it. (356.)

6. —— *Duty of Plaintiff to Minimize His Injury.* Action by tenant against landlord for the loss of a part of his crop, and injury to the residue, by the landlord's failure to provide water for the irrigation of the land, according to his covenant. There being evidence that by an expenditure of $15.00, as to one source of supply, and the payment of the water tax, as to another, the tenant might have averted the loss, it was said that if it should clearly

appear, upon a second trial, that it was reasonably within the tenant's power to avoid the loss, he should be allowed only the amount necessary to be thus expended. (358, 9).

Error to Adams District Court. HON. CHAS. MCCALL, Judge.

MR. T. WEBSTER HOYT, for plaintiff in error.

No appearance for defendant in error.

MORGAN, J.

Plaintiff was the lessee of a farm, and sued the lessor for $2056.65, damages to growing crops, alleged to have been caused by the lessor's failure to pay for the water for irrigation thereof, as provided in a written lease. Plaintiff obtained a verdict and judgment for $318.15, and defendant assigns error on the following grounds:

First, it is contended that the action was not in the name of the real party in interest, because it appeared on the back of the lease, when it was set forth in an amendment to the complaint, and when it was introduced in evidence, that it had been assigned. Such assignment was made, however, after the injury sued for occurred, and there was no evidence of an assignment of the claim for damages. The mere assignment of the lease, at such time, would not carry with it the claim herein, in the absence of any other evidence on the matter. It is stated in Jones on Landlord and Tenant, sec. 436: "The word 'lease,' when used in a contract of assignment to designate the interest transferred, has a definite legal signification—it means the estate in the land." The defendant did not plead or offer to prove that the claim for damages herein had been assigned. And the suit was brought almost immediately after the assignment, and no evidence was introduced as to damages accru-

ing after the date of the assignment. Mr. Jones says, also, at sec. 448, at p. 513:

"Though it appears that the lessee has assigned his lease for the remainder of the term to another party, yet it is competent for him to institute an action for any damages accruing to him by reason of the breach of the covenants of the lease by the lessor, while he held the lease, and to recover such damages it is proper that the lease be exhibited in evidence."

In the case of *C. C. C. & St. L. Ry. Co. v. Wood,* 189 Ill., 352, 355, 59 N. E., 619, it was contended, that it appeared from the evidence, "that this lease, and all rights under it, have been transferred from the plaintiff, since which time he has had no interest in the lease, or any connection with the contract, and therefore cannot maintain an action upon it."

And the court said:

"Though it appeared the appellee had assigned the lease for the remainder of the term to another party, yet it was competent for him to institute an action for any damages accruing to him by reason of a breach of the covenants of the lease on the part of the appellant company while he held the lease, and to recover such damages it was proper the lease should be exhibited in evidence."

Second, it is next contended that it was error to overrule the demurrer to the complaint. The complaint demanded a greater amount of damages than any true measure thereof would warrant, from the facts alleged, but this did not prevent it from stating a cause of action for a less amount upon a true measure.

Third, it is then contended that erroneous instructions were given concerning the measure of damages, and it is concluded that for such error the judgment must be reversed; and, in view of the possibility of another trial, the reversible error will be pointed out, although the case of the *Colo. Con. L. & W. Co. v. Hartman,* 5 Colo. App., 150,

38 Pac., 62, ought to have been, and should be, a sufficient guide.

There are instances where such erroneous instructions would not constitute reversible error, as in *Denver P. W. Co. v. Munger,* 20 Colo. App., 56, 77 Pac., 5, and in *Seyfried v. Knoblauch,* 44 Colo., 86, 96 Pac., 993, wherein the damages proved were, at least, equal to or greater than the verdict; but in the present case the facts proved were not sufficient upon which to base any true rule for the measure of damages, or upon which any damages could be rightfully based, when measured by any true rule. And, if error had been assigned upon the refusal of the court to give defendant's proffered instruction for a directed verdict, the judgment would have been reversed for that reason alone. It is concluded, however, that the assignment as to the erroneous instructions given accomplishes the same result.

One measure of damages submitted by the lower court, and applied to the crops totally destroyed, as well as to those only injured, was "the cost of preparing the ground, seeding, planting, cultivating and caring for the crops up to the time of the injury," plus "reasonable profits;" another measure submitted was "the cost of preparing the ground, sowing, cultivating and caring for the same; the cost of harvesting, marketing, and the value of the crop at its maturity," followed by an instruction to allow "reasonable profits," "in addition to the actual damage." These instructions, more or less, fit the evidence, but as both the evidence and the instructions were based upon a misconception of the measure of damages, the jury were misled, and, by reason of such error of the court, found the verdict. If a true measure of damages had been submitted the jury would have found themselves without sufficient evidence to find any damages, for the reason that there was no evidence, except to prove the cost of preparing the ground, seeding, sowing, planting, cultivating and caring for the crop, up to the time of the injury, especially as to the crops only

injured or partially destroyed. As to those totally destroyed, no recovery should have been permitted at all, under the evidence, for reasons hereinafter given.

The true measure of damages, as to growing crops, totally or partially destroyed, is not what it cost to raise them up to the time of the loss, nor what it would have cost to raise them up to maturity; and, if "reasonable profits" be added to such cost, it would be exceedingly fortunate to lose them. As stated in the *Hartman* case, the proper rule as to the measure of damages as to the total destruction of annual crops (as distinguished from perennial) is the value thereof at the time and place of the loss; that is, immediately before the loss, considering their condition at that time. And the method or data that is submitted to assist the jury in arriving at such value should be as carefully stated as the rule itself. One method, mentioned in the *Hartman* case, may be stated as follows: If the crop has no market value at the time and place of the loss, and there is a reasonable certainty that it would have matured if the breach of the lease had not occurred, the jury should be told to ascertain what such crop, considering its condition immediately before the destruction, would ordinarily have brought on the market, with ordinary care in maturing, harvesting and marketing, considering the average yield of such crops, in the same season and locality, on similar land, under similar circumstances; and then to deduct from such market value what the ordinary and prudent expense would be to mature, harvest and market such a crop; and that such difference would be the value of the crop destroyed, or the damage sustained. Where the action is by the lessee against the lessor, and the rent reserved is, as in this instance, a part of the crop, the verdict should be diminished to the extent of such a part of the value or damage found as the lessor was to receive as his part of the crop. The *Colo. Con. L. & W. Co. v. Hartman, supra; Teller v. The Bay & R. D. Co.*, 151 Cal., 209, 50 Pac., 942,

12 L. R. A. (N. S.), 267, 12 Ann. Cas., 779; *Smith v. Hicks*, 14 N. M., 560, 98 Pac., 138, 19 L. R. A. (N. S.), 938; *Sayers v. Mo. Pac. Co.*, 82 Kans., 123, 107 Pac., 641, 27 L. R. A. (N. S.), 168. See especially the notes to these L. R. A. cases.

This rule would have fit the plaintiff's evidence as to his oats and wheat, which were totally destroyed, and which were to be irrigated from what is called the "upper ditch," as he proved the usual expense up to and after the loss, and the market value after maturity, but the rule given by the lower court was not appropriate, and the evidence discloses that a rule different from the one given by the lower court, and from the one above outlined, should have been submitted, as to these crops, for this reason: The upper ditch was a winter ditch, not furnishing water after the first part of March, its only use being to furnish water to soak or saturate the land under it prior to that time, and the plaintiff testified, and based his claim upon the allegation, that he could not obtain the water from this ditch; but that he, nevertheless, prepared the ground and planted his oats and wheat on the land under this ditch, and stated that he depended on the rain; but that the rain did not come, and his oats and wheat died when about three inches high. Now, it would not be just for him to recover damages under the rule as to the destruction of growing crops, because he ought not to have incurred the risk of so planting these crops, and then call upon the defendant for his subsequent loss thereof, under the rule aforesaid. It was his duty to lessen, rather than increase, the damage resulting from the lessor's breach of the lease. *Houston, etc., Co. v. Campbell*, 91 Tex., 551, 45 S. W., 2, 43 L. R. A., 225; *Fisher v. Goebel*, 40 Mo., 475. The true measure of his damage would be the same as if he had been prevented from planting, and had not planted, these crops. The measure of damages, in such instances, is plaintiff's actual loss, at the time of the breach, sustained by reason of not being permitted

to use such land as contemplated by the lease; such loss to be ascertained by finding the difference between the rental value of the land with water, and the rental value without it, as outlined in the cases of *Crow v. San Joaquin Ir. Co.*, 130 Cal., 310, 62 Pac., 562, 1058. No such rule was submitted, and there was no evidence of the rental value without water, and only by inference, as to its rental value with water. Consequently, the damages as to the wheat and oats must be eliminated.

The damage to the alfalfa and beets will be considered now, to ascertain whether the erroneous instructions affected the verdict concerning them. They were injured only, not entirely destroyed.

The measure of damages to annual growing crops, not totally destroyed, but only injured, is the difference between the value immediately before the injury and the value immediately thereafter; that is, the lessened value of the crops. *Sabine & E. T. R. Co. v. Joachimi*, 58 Tex., 456; *Trinity & S. R. Co. v. Schofield*, 72 Tex., 496, 10 S. W., 575; *Gulf Co. v. Nicholson* (Tex. Civ. Ap.), 25 S. W., 54; *Little Rock, etc., Co. v. Wallis*, 82 Ark., 447, 102 S. W., 390. The method or data which should be submitted to the jury to assist them in arriving at such difference, or damage, should be the same, with reference to the value before the injury, as above stated, concerning crops totally destroyed. The value after the injury, that is, the value in their injured state, or condition, should be found by considering what they could be made to bring on the market, and deducting therefrom the ordinary and prudent expense in maturing and marketing them. The instructions given wholly failed to submit any true measure, or method of arriving at it, concerning the alfalfa and beets, which were only injured, and not destroyed, by lack of water, but the jury were told that they should find the cost of preparing the ground, seeding, planting, cultivating and caring for the same, up to the time of the injury; without instructing them to deduct anything

for the value after the injury, although the evidence showed that plaintiff sold his interest in the lease and assigned it soon after the injury, and that he cut the alfalfa once and sold it, and that the assignee matured and marketed the beets. It does not appear what he received from his assignee, nor what the latter received for the crops, thus turned over to him, after maturing them, nor what the reasonable expense was in so doing. So, it is clear that there was neither evidence to meet a proper rule, nor proper rule itself, given to the jury upon which a verdict could be founded, as to such damage. It may be assumed that the jury followed the incorrect rule given to them, and found the value of the crops of alfalfa and beets, as they stood, prior to the injury, and based their verdict upon that. If plaintiff was thus given the value of those crops before the injury, and then sold them to the assignee of the lease after the injury, he was exceedingly fortunate again, for he would thus receive full value for them, the same as if they had been totally destroyed, and then receive value for them in their injured condition. The probability is that the jury did the best they could, in the absence of evidence and proper instructions, and guessed at the matter. The instructions given, as to the measure of damages, served to misdirect, rather than to assist them, in arriving at plaintiff's alleged loss.

There was also a claim for loss of pasturage and beet tops that might have been obtained if the water had been furnished, but these damages would clearly accrue after plaintiff assigned the lease, and cannot be considered.

It appears from the evidence that by an expense of about $15 in putting in the upper ditch proper board checks, plaintiff could have avoided the damage occurring to the crops under that ditch; and that by paying the water tax, as to the lower ditch (which he finally did, but too late, as, he alleges, to prevent the damage), he could have avoided the loss occurring to the crops under this ditch; and if it

should clearly appear, on another trial, that it was reasonably within his power to pay for these things, and he failed to do it, his measure of damages would be only the amount necessary to be paid to avoid the damage. A person is not entitled to compensation for injurious consequences due to the breach of contract, so far as he had the information, time and opportunity necessary to prevent them. *Brandt v. Gallup*, 111 Ill., 487, 497, 53 Am. Rep., 638. It is the duty of a person injured by the fault of another to use all reasonable means to protect himself against injurious consequences. *Lloyd v. Jones*, 60 Vt., 288, 289, 13 Atl., 638.

The judgment is reversed and remanded for another trial in accordance with this opinion.

[No. 4040.]

HOUSE ET AL. V. ANDERSON.

VACATING JUDGMENT—*Effect.* A writ of garnishment issued upon a judgment is without vitality after the judgment is vacated. Such ancillary proceedings fall with the judgment.

Error to Logan District Court. HON. H. P. BURKE, Judge.

MESSRS. MUNSON & MUNSON, for plaintiffs in error.

MESSRS. NAUGLE & TURMAN, for defendant in error.

Opinion by CUNNINGHAM, P. J.

Owing to omissions and defects in numbering the pages and folios of the original transcript of record, and to the fact that the record has not been arranged chronologically, we have found considerable difficulty in following the num-

erous steps in the very unusual proceedings had in the trial court in this case.

We think no good purpose can be subserved by stating, at any great length, the various orders entered in the trial court in the progress of the cause. It is sufficient to say that the judgment herein appealed from was rendered in a proceeding wherein the answers made by the plaintiffs in error to certain garnishment writs were traversed; also that the aforesaid writs of garnishment had been issued upon a judgment against the plaintiffs in error. In other words, we have the unusual proceeding of writs of garnishment being issued upon a judgment in which the garnishees were likewise the judgment debtors. Furthermore, the judgment upon which the writs were issued had been vacated and set aside by the trial court after the writs had been served, and before the hearing on the traverse was had. But, for some reason, the court declined to quash or vacate the writs of garnishment issued upon a judgment that had been vacated.

The trial court was entirely justified in vacating the judgment upon which the writs of garnishment had issued, and it is clear that thereafter said writs were without any vitality, since they fell with the vacating of the judgment upon which they were based.

Counsel for defendant in error has called our attention to no precedent or authority supporting the actions of the trial court, as hereinabove narrated, and we know of none.

In view of the conduct of the plaintiff in error, L. H. House, as disclosed by his own testimony, it is with much regret that we find ourselves unable to sustain the judgment herein as to him, but to do so would be to subvert or ignore the most elementary principles of practice and procedure.

Reversed.

[No. 4161.]

THOMPSON V. ROWE.

1. CORPORATION—*Transfer of Stock by Deed.* Corporate stock, though personalty, may be effectually transferred by deed. The statute providing that it shall be transferred upon the books of the corporation, is for the protection of innocent purchasers. As between the parties, and all taking with notice, a transfer by deed is effectual. (363, 364.)

A mortgage of lands, after the description thereof, contained a clause to the effect that all ditch and water rights and stock in an irrigating company named, was also conveyed. One having notice of the mortgage, and of the stock there referred to, procured a certificate for such stock to be issued to himself, by a fraud practiced upon the officers of the corporation. *Held* that the stock was subject to mortgage. (363, 364.)

2. CHATTEL MORTGAGE—*Annual Statement of the Debt.* Even though the annual statement of the indebtedness secured by a chattel mortgage is not recorded, as required by statute (Rev. Stat., sec. 515), the mortgage is valid as to the mortgagor, as to an assignee of the chattels who has covenanted to pay it, and one who, not being a *bona fide* holder claims under such assignee. (364.)

Error to Mesa District Court. HON. THOMAS J. BLACK, Judge.

MESSRS. WHEELER & WEISER and MESSRS. ALDERMAN & CLARK, for plaintiff in error.

MR. ERNEST LEAVERTON and MR. L. L. MORRISON, for defendant in error.

MORGAN, J.

Rowe, the assignee of some notes and the mortgage securing them, had a decree in the lower court, in his two suits, consolidated and tried as one, foreclosing his mortgage on the real estate and some stock in the irrigation company furnishing water for the land mortgaged. The mortgagor had bought the land and had forthwith given the mortgage to his grantors, probably to secure the purchase price, and never had but one certificate, which was

for 29 shares of stock out of the 189 shares, which belonged to his grantors, turned over to him, or transferred to him on the books of the irrigation company, or in any other way, except as to the 29 shares, unless it was done by the deed which he received from his grantors. The certificate for the remaining shares, it appears, had been lost; consequently, the 189 shares remained, so far as the books of the company showed, in the name of his grantors, who were also his mortgagees, for about a month after the mortgage was given. The only effort to transfer the stock to the mortgagees, or to their assignee, Rowe, was by the following words in the mortgage:

"Together with any and all ditch and water rights, including any ditch stock in the Grand Valley Irrigation Company, furnishing water for the irrigation of said land, being about 59 statute inches."

About a month after the mortgage was given, the mortgagor sold and conveyed the land, and had the stock duly assigned, to a corporation of which he was the secretary and a director, which grantee assumed and agreed to pay the mortgage indebtedness, and which, shortly before this suit was brought, assigned the stock to Thompson, one of the defendants in both suits, and the plaintiff in error, who now claims the stock free from the incumbrance of the mortgage. By his answer he disclaims any interest in the premises described in the complaint, except his interest in the stock, and at the trial he introduced no material evidence, but relied upon the allegations and proof of the plaintiff as being insufficient to warrant the decree.

Plaintiff's evidence showed that when the mortgagor sold and conveyed the land to the corporation grantee, the irrigation stock was properly transferred on the books of the company to such grantee, through the efforts of the mortgagor and his grantors, without any other consideration, so far as the record discloses, than what was paid by it for the property conveyed by the deed to it; that Thomp-

son had the stock transferred to himself on the books of the irrigation company by presenting to the secretary thereof a duly assigned certificate of the stock from the said corporation grantee; that the ditch stock referred to in the mortgage was the same as that held by Thompson, and was the source of the water used to irrigate the mortgaged land, and that Thompson knew it, and stated to the secretary of the irrigation company, at the time he had the stock transferred to himself, that he, or a corporation he represented, and was a director in, had a deed in blank for the mortgaged land, from the aforesaid corporation grantee, and that he did not intend to take the stock away from the land, but intended to hold it so that it could be transferred with the land, thereafter, in case of a sale.

These facts, and others not necessary to enumerate, evidently satisfied the lower court that the mortgagor intended to mortgage the stock with the land to secure the notes, and sold the land and the stock to the corporation grantee, and that he became aware of the fact that the stock had never been properly transferred to him when he sold the land and the stock, and then transferred on the books of the irrigation company the 29 shares, which he at that time had in his hands, to his said grantee, and that he and his grantors, by giving an indemnifying bond to the irrigation company on account of the lost certificate, then had the remaining shares transferred properly on the books of the company; and that all of the parties to this last transfer knew and fully understood that the mortgage included the stock as well as the land, and that the defendant Thompson so knew it and understood it was not a *bona fide* owner of the stock.

In the case of *Richardson v. Longmont Ditch Co.*, 19 Colo. App., 483, 493, 76 Pac., 546, it is held that a transfer of corporate stock may be made by deed, as between the parties, although it is personal property, and although the statute provides that it must be transferred on the books

of the company; and that there is no reason for observing the statute, as between the parties, but only as to innocent purchasers for value. In the case of *Iron Stone Co. v. Equitable Co.*, 52 Colo., 268, 274, 121 Pac., 174, Halley claimed corporate stock, under circumstances similar to those existing in the present case, and the court said:

"If the court had retained jurisdiction over the person of Halley, and he still had possession of the stock certificate, and the court found from the evidence he was not a *bona fide* purchaser for value, then it could have compelled him to assign and surrender the stock for cancellation, ordered it cancelled, and a new certificate issued to the substituted trustee. 3 Clark & Marshall Private Corporations, p. 1844, sec. 607, p. 1755, sec. 572, p. 1751, sec. 571; 6 ed., secs. 373, 382, Cook on Corporations; *Atkinson v. Foster*, 134 Ill., 473 [25 N. E., 528]."

It is concluded that the plaintiff's evidence was sufficient to show that Thompson was not a *bona fide* holder of the shares of stock, and was not an innocent purchaser for value, and that he took the same subject to the mortgage.

It is also contended by defendant Thompson that as the mortgage of the stock operated as a chattel mortgage, and as the indebtedness secured exceeded $2500, and as no annual statement had been recorded as required by Sec. 515, R. S. 1908, such mortgage, as to him, had ceased to be a lien upon the stock. Without considering the question as to the operation of this mortgage as a chattel mortgage, in this instance, it is concluded that the defendant Thompson is not in a position to raise this question, because, not being a *bona fide* holder of the stock, he could not assert any greater rights than the grantee of the mortgagor from which he obtained it; and as such grantee assumed and agreed to pay the mortgage, he was, in effect, one of the parties to it, and the mortgage was good and valid as between the parties to it, without a compliance with sec. 515

aforesaid. It is provided in sec. 519, R. S. 1908, that a chattel mortgage is good and valid between the parties to it until the indebtedness is paid.

The judgment is therefore affirmed.

[No. 4166.]

BUTLER V. MAIER.

1. DAMNUM ABSQUE INJURIA—*Affords No Action.* A corporation had agreed to convey to defendant, certain lands and water rights upon conditions specified. Defendant assigned the contract to plaintiff, agreeing to pay the interest up to a certain date upon the installments of purchase money due to the corporation. *Held* that though defendant had defaulted, the plaintiff, not having himself made the payment, nor sustained any injury by defendant's default, was not entitled to an action. (366.)

2. PRACTICE—*Waiver of Objection.* One who appears to contest in the County Court, a motion for a new trial, without objection, will not be heard to afterwards object that the motion was not made in due time. (366, 367.)

Error in the denial in the District Court, of a motion to dismiss an appeal from the County Court, is waived by proceeding to trial upon the merits. (367.)

3. APPEALS AND ERROR—*What May Be Assigned for Error.* Error can not be assigned upon the refusal to allow an answer to a question where the purpose of the question, or the testimony sought to be elicited, is not made to appear. (367.)

Error to Prowers District Court. HON. A. WATSON MCHENDRIE, Judge.

MESSRS. HESS & CUCKOW, for plaintiff in error.

MESSRS. GORDON & GORDON, for defendant in error.

KING, J., delivered the opinion of the court.

In this opinion defendant in error will be called plaintiff, and plaintiff in error will be called defendant, as in the trial court.

Defendant assigned to plaintiff two written contracts by which The Arkansas Valley Sugar Beet and Irrigated Land Company agreed to convey to defendant certain lands and water rights, in consideration of payments to be made, and conditions to be performed, by defendant as therein specified. The complaint alleges, and the evidence for plaintiff tends to prove, that upon making said assignments defendant agreed to pay all the interest to August 9, 1912, on deferred payments, and all assessments on water rights to October 1, 1912, as required to be paid by the terms of the contracts so assigned; that said interest amounted to $417.53, and water assessments to $112.00; that defendant had not paid the same, and that plaintiff had paid the water assessments only. The jury was instructed to return a verdict for plaintiff for both amounts, with interest added, if it found that defendant agreed to pay said items. Verdict and judgment for plaintiff in the sum of $561.20.

1. Until plaintiff has paid the interest in question, or has been otherwise damaged by failure of defendant to pay the same, no cause of action has accrued in plaintiff's favor on that account. By the terms of the alleged agreement he was not compelled to pay the interest, and by the assignments defendant was not relieved of his liability to pay it to the land company. No cause of action was alleged or proven to sustain the instruction or verdict as to that item.

2. The court did not err in overruling defendant's motion to dismiss the appeal from the County Court. The error assigned, so far as it is based on proceedings in the County Court, was waived by appearing in that court on the motion for new trial, without objection on the ground that the motion was not made in due time. Moreover, even if it be assumed that the District Court should have granted the motion to dismiss the appeal that error was waived by

going to trial on the merits. Defendant thereby submitted himself to the jurisdiction of the District Court, and cannot now be heard to raise that objection. *Silver Mountain Mining Co. v. Anderson,* 51 Colo., 298, 301, 117 Pac., 173; *Tucker v. Tucker,* 21 Colo. App., 94, 121 Pac., 125; *Brown's Estate v. Stair,* 25 Colo. App., 140, 146, 136 Pac., 1003; *Fairbanks, Morse & Co. v. McCloud,* 8 Colo. App., 190, 194, 45 Pac., 282.

3. The error assigned to the ruling of the court in excluding certain testimony offered by defendant's witnesses, Pierce and Thurston, is unavailing for reasons given in *City of Pueblo v. Bradley,* 23 Colo. App., 177, 179, 128 Pac., 888.

4. All other objections raised by the assignment of errors have been considered, and are overruled.

Judgment will be reversed and the cause remanded, with directions to enter judgment for plaintiff for $112.00, together with interest thereon at 8% per annum from the date of the commencement of this action in the County Court, and to dismiss the cause of action upon the item of deferred interest, without prejudice to plaintiff's right to begin a new suit to recover on that part of the agreement if he be so advised.

Reversed and Remanded.

[No. 4167.]

DIVINE V. WESTERN SLOPE FRUIT GROWERS ASSOCIATION.

1. PROMISSORY NOTE—*Failure of Consideration.* One who is induced to purchase stock in a corporation then being organized, by the representation that the corporation is to limit its operations to the shipment of fruit grown by its stockholders, and that only by uniting with it will he be able to secure its service in the shipment of his fruit, may defeat an action upon a promissory note given for the stock, by proof that in fact, the corporation engaged in a general commission business, and had refused, and confessed itself unable, to ship his fruit. (369, 370.)

2. —— *Conditional Delivery.* Where a promissory note is in the hands of the corporation payee, named therein, the maker may defeat an action thereon by showing under proper averment that he subscribed the paper, solely to enable the corporation to pledge it, temporarily, with a bank, as security for a loan, that the loan was in fact made, and the note afterwards restored to the corporation. (Rev. Stat., sec. 4479.) (371.)

3. —— *Evidence—Parol Admissible,* in an action upon a promissory note, to show that it was delivered for a special purpose. (371.)

4. CASES OVERRULED—*Explained or Distinguished.* What is said in Cooper v. German Bank, 9 Colo. App., 169, as to the inadmissibility of parol evidence to show the purpose for which a promissory note was delivered, is modified by later opinions of this court, and numerous opinions of the Supreme Court. *Wells v. Colorado Company,* 49 Colo. 508, commented upon and explained. (371, 372.)

Error to Mesa District Court. HON. CHARLES CAVENDER, Judge.

MR. ELMER L. BROCK and MESSRS. MCMULLIN & STERNBERG, for plaintiff in error.

MESSRS. WHEELER & WEISER, for defendant in error.

CUNNINGHAM, P. J.

Defendant in error, hereinafter referred to as "plaintiff," brought its action on a promissory note, and had judgment. Plaintiff in error, hereinafter referred to as the "defendant," attempted to defend upon two principal grounds: First, failure of consideration; second, a conditional deliv-

ery of the note. By sustaining demurrers to the various answers filed by defendant, and, finally, on the trial, to his offer of proof, these defenses were both practically denied the defendant, and therein we are persuaded the trial court committed reversible error.

Briefly stated, the salient, undisputed facts in the case are substantially as follows: Defendant purchased stock in the plaintiff corporation and executed and delivered to its representative a promissory note, the face of which equaled the amount the defendant was to pay for the stock. When the note, by its terms, had matured, defendant refused to pay same, and this suit was brought, with the result already stated. The certificate representing the stock, by the terms of a collateral written agreement between the parties, was never delivered to defendant, the same being held by plaintiff as security for the payment of the note, and the plaintiff, in its complaint, offering to deliver to defendant the stock upon demand.

1. On the trial plaintiff offered the note and rested. Thereupon the defendant offered to prove, among other things, that he had been induced to purchase the stock solely upon the representation that the company then being organized would be strictly a mutual affair. That is to say, it would limit its operations entirely to the shipment of fruit grown by its own stockholders, and in this connection defendant offered to prove that it was represented to him by the promoters of the corporation, before incorporation, and its officers and agents thereafter, that he could only avail himself of the opportunity of shipping his fruit through the corporation by becoming a shareholder therein. Other proof of this character was offered. Defendant also offered to prove that he soon discovered the falsity of these representations. That is to say, that the company shipped fruit for those who were not stockholders as well as for those who were. In other words, defendant offered to prove that the corporation engaged in a general commission busi-

ness. Further proof was offered by defendant tending to show that the plaintiff repeatedly refused to ship his fruit, and finally conceded its inability to handle same. Thereupon the defendant promptly rescinded the agreement to purchase the stock, and so notified plaintiff. All the proof thus offered by the defendant, notwithstanding it tended to support apt averments contained in the answer, was objected to by the plaintiff and refused by the court.

We think the proof thus offered and refused was proper under the rule laid down in *Zang v. Adams*, 23 Colo., 408, 48 Pac., 509, 58 Am. St. Rep., 249; *United States Home Co. v. O'Connor*, 48 Colo., 354, 110 Pac., 74; Cook on Corporations (6th Ed.), sec. 194; Thompson on Corporations (2nd Ed.), vol. 1, secs. 779, 780 and 781. And if the same had been admitted by the court, and in no way controverted by the plaintiff, it would have constituted a complete defense to the payment of the note in the hands of the original payee.

2. In support of his second defense, namely, the conditional delivery of the note, defendant offered to prove that, at the suggestion of the plaintiff, he executed and delivered the note for the sole purpose of enabling the plaintiff to pledge the same with a bank as collateral security for money which the company had borrowed in order to enable it to transact the business for which it was organized until such time as it would come into possession of ample funds of its own. He further offered to prove that the note had been so pledged, but that the corporation had paid its obligations to the bank and had come again into possession of the note. This proof was also supported by proper allegations in the answer. This offer of proof was rejected, apparently, upon the theory that it violated the rule against the admission of parol evidence to contradict or alter the terms of a written agreement.

Section 16 of our Negotiable Instrument Act, the same being section 4479, R. S. 1908 (section 5066, M. A. S. 1912),

permits the payor of a note to show that he delivered the same conditionally, or for a special purpose only, and not for the purpose of transferring the property in the instrument, where the note, as in this case, is in the hands of the original payee, who brings suit on the same.

Our courts have frequently ruled that oral testimony is admissible to show the condition upon which the written agreement was to become effective, if at all. *Norman v. McCarthy*, 56 Colo., 290, 138 Pac., 28; *Sayre v. Leonard*, 57 Colo., 116, 140 Pac., 196; *Brewing Co. v. Barets*, 9 Colo. App., 341, 48 Pac., 834; *Mosier v. Kershow*, 16 Colo. App., 453, 66 Pac., 449; *Bourke v. Van Keuren*, 20 Colo., 95, 36 Pac., 882; *Hurlburt v. Dusenbery*, 26 Colo., 240, 57 Pac., 860; *Roberts v. Greig*, 15 Colo. App., 378, 62 Pac., 574. The following additional authorities support the rule followed by our own courts in the cases last above cited: I Enc. of Law (2nd Ed.), p. 343; 21 Enc. of Law (2nd Ed.), p. 1111; *Street Ry. Adv. Co. v. Metropole Shoe Mfg. Co.*, 91 Md., 61, 46 Atl., 513; *Smith v. Dotterweich*, 200 N. Y., 299, 93 N. E., 985, 33 L. R. A. (N. S.), 892; *Burke v. Dulaney*, 153 U. S., 228, 14 Sup. Ct., 816, 38 L. Ed., 698. *Burke v. Dulaney* has become a leading case in this country, and has been cited with approval repeatedly by our Supreme Court and the former Court of Appeals. See, also, *George v. Williams* (No. 4180), 149 Pac., 837, just handed down by us, wherein Judge Hurlbut has cited and quoted at length from several very strong opinions.

Much reliance is placed by defendant in error upon the case of *Cooper v. German Nat. Bank*, 9 Colo. App., 169, 47 Pac., 1041. If there is any announcement in the opinion in the Cooper case necessary to a decision of the questions involved therein, in conflict with the conclusion we have reached in this case, namely, that the trial court erred in excluding the testimony offered to establish the purpose for which the note here sued upon was delivered, it must be clear that the opinion in the Cooper case has been modified

by later opinions in the same court, and by numerous opinions by our Supreme Court.

As we read the statement of facts in the Cooper case, the announcement of the court upon the question here under consideration was not necessary to a decision of the questions then before the court, and the same observation applies, we think, to the opinion in *Welles v. Colo. Nat. Life Assur. Co.*, 49 Colo., 508, 113 Pac., 524. Both the Welles and the Cooper cases involved questions of pleading and practice, and it was not, as we read the opinions in those cases, necessary to determine, or even consider, the question of the admissibility of a parol agreement for the purpose of varying or effecting a written contract.

In the Welles case it was alleged, concerning the note there sued upon:

"That before its maturity it was duly indorsed and delivered to the plaintiff who became, and now is, the owner and holder thereof; that no part of said note has been paid; that there is due thereon from the defendant to plaintiff a certain amount, with interest," etc.

It appears from the opinion that the answer to the foregoing allegations was, by the trial court, held bad on demurrer, and, the defendant electing to stand upon his answer, judgment was rendered against him. The Supreme Court found that the answer was fatally defective, and upheld the ruling of the trial court. Hence, it will be seen, from the pleadings in the Welles case, there was no denial that the note sued upon had been duly indorsed and delivered to the plaintiff before maturity, and the same had not been paid. That is, there was no proper denial of these allegations. Furthermore, the Colorado cases cited in support of the announcement made in the Welles case, pertaining to the question here under consideration, were of a date prior to the adoption of our Negotiable Instrument Act.

In the Cooper case, immediately preceding the announcement with reference to oral agreements, appears the following:

"The effect of the so-called 'second defense and cross-complaint' was to impeach and destroy the note. The issues presented and tried were those arising out of an alleged verbal contract made between the defendants at the time of making the note, *issues in which the plaintiff was not a party and in which it had no interest and which were no defense to the note against the plaintiff.*" (The italics are ours.)

We can add nothing to the lucid argument of Chief Justice Musser in *Norman v. McCarthy, supra,* and of Justice Bailey in *Sayre v. Leonard, supra* (both later cases than *Welles v. Colorado Nat. Life Assur. Co.*), wherein the distinction between an attempt to vary the terms of a written contract and an attempt to deny the delivery of a negotiable instrument as a completed contract is set forth with much clearness.

For the errors to which we have called attention the judgment must be reversed.

Reversed.

[No. 4168.]

NITRO POWDER COMPANY v. AMERICAN POWDER MILLS.

1. PRINCIPAL AND AGENT — *Agent's Authority — Evidence — Burden of Proof.* Plaintiff seeking to charge defendant with the contracts of another, upon the ground that the latter, in making the contract, acted as agent of defendant, has the burden of proving the agency, and that the agent was acting within his authority. (381.)

The evidence examined and held insufficient to establish plaintiff's case. (375, 387 379.)

2. —— *Known Limitations Upon the Agent's Authority—Effect.* One dealing with the agent in a matter which, as he knows, is in excess of an express limitation upon the agent's authority, will not be heard to assert that the act of the agent was within the apparent scope of his employment. (381.)

Error to Denver District Court. HON. JOHN W. SHEAFOR, Judge.

MR. R. D. THOMPSON and MR. C. J. BLAKENEY, for plaintiff in error.

MR. MILTON SMITH, MR. CHAS. R. BROCK and MR. W. H. FERGUSON, for defendant in error.

BELL, J.

In this action American Powder Mills, defendant in error and plaintiff below, hereinafter called plaintiff, seeks to recover of Nitro Powder Company, plaintiff in error and defendant below, hereinafter called defendant, the value of certain shipments of fuse, which it claims to have sold and delivered to defendant through A. A. MacLean, its agent in Denver.

Both plaintiff and defendant are foreign corporations, authorized to do business in this state, and acting here at the time of the transactions in controversy through agents, George T. Kearns and A. A. MacLean, respectively, by whom the alleged sales were negotiated. Defendant denies any and all knowledge of the purchases so charged to it, made by MacLean, and contends that said MacLean, by virtue of a written contract, was merely its sales agent, with no authority whatever to bind it for any purchases. The case was tried to a jury and resulted in a verdict for plaintiff, upon which judgment was accordingly entered.

On page 3 of its brief and argument plaintiff says: "It appears from the testimony introduced at the trial that MacLean's actual authority was merely to act as sales agent

for the Nitro Powder Company. It is our contention, however, that notwithstanding this actual limitation upon MacLean's power, the Nitro Powder Company is nevertheless liable for the purchase price of the fuse in question, for the reason that MacLean in so purchasing the fuse was acting within the apparent scope of his authority;" and on page 19, after stating the general rule to the effect that where a person holds out another to the public as having a general authority to act for him in the particular business in which he is engaged, third persons may safely deal with the agent in the transaction of such business, it says: "It is upon this principle that we rely to sustain our contentions in this case."

In proof of defendant's liability, plaintiff relies upon the facts that MacLean occupied offices at 51 Bank Block, Denver, upon the door of which was printed, to the knowledge of the defendant company, "Nitro Powder Company, Kingston, N. Y.," with a description of Nitro Palistine Powders and the name "A. A. MacLean, Agent;" that MacLean, with the acquiesence of the defendant company, used stationery upon which was printed the name "The Nitro Powder Co.," with the names of its officers and directors, its New York address, its trade mark, the names of its products, with the dates of their patents, together with the following:

"Dealers in
Fulminating Caps, Batteries, Fuse and Other Mining Supplies.
Western Office,
A. A. MacLean, Agent. 51 Bank Block,
Denver, Colo."

that MacLean carried an account in one of the Denver banks, upon which he drew checks to the order of plaintiff, signed "Nitro Powder Company, A. A. MacLean, Agent," in payment of other shipments of fuse and powder; that the account charged to the defendant company by plain-

tiff covered a period of over five months; that correspondence regarding it received by plaintiff was written on stationery similar to that above described, and signed with a rubber stamp "Nitro Powder Co., ———————— Agent," with MacLean's name or initial preceding the word "Agent;" that the goods in question were ordered by MacLean, or his stenographer, the orders transmitted to the plaintiff company by Kearns, the goods shipped through The Denver Transit & Warehouse Company for the Nitro Powder Company, subject to MacLean's directions, and the invoices for each shipment were mailed to the Nitro Powder Company at Denver, together with the bills of lading.

In *Gates Iron Works v. The Denver Engineering Works Company*, 17 Colo. App., 15-23, 67 Pac., 173, almost identical facts were relied upon by the plaintiff therein to establish its claim for the value of goods, wares and merchandise alleged to have been sold and delivered to the defendant. There, as in the instant case, the evidence showed that the headquarters of the defendant were outside of the state; that B. L. Berkey was its agent in Denver; that the property sold by the plaintiff, and with which it sought to charge the defendant, was mining machinery; and that it was sold to Berkey, who bought it in the name of the defendant. It was not shown that Berkey had any actual authority from the defendant to purchase the machinery, or that his action in the matter was ratified, or that the defendant derived any benefit from the purchase, or knew anything whatever about the use of its name in the transaction. The sole ground upon which the liability was asserted was that the defendant clothed Berkey with an appearance of authority, upon which the plaintiff had the right to rely. This appearance of authority consisted in a sign on the office window bearing the name of the defendant, Gates Iron Works, a description of the manufacturers, the words "Mining Machinery of all Kinds," and underneath the name B. L. Berkey, Manager. This sign was on the window when the

order for the goods was received; the letter head of defendant contained the picture of a machine shop, the defendant's name, the names of its officers, the names of its manufactures, its Chicago address, together with the following: "B. L. Berkey, Man'g'r, 422 Seventeenth St., Denver, Colo.;" defendant's business card, which its agent, Berkey, used, also contained a picture of its manufacturing establishment and machine shops, its name, business and specialties; its Chicago address, and the name of B. L. Berkey as Manager, with the Denver office and telephone number; and it was testified to that Berkey issued a circular announcing his employment by the defendant company, and the opening of his office, and it was shown that the letter head and card came from the defendant, and that the defendant knew that Berkey advertised himself as manager of its Denver office. William J. Miller, general manager of the plaintiff company, testified that the plaintiff had no knowledge of the relations which Berkey bore to the defendant, other than that furnished by the letter heads and sign on the office window; that he made no inquiry with reference to the authority of Berkey from anyone, and that he relied simply on "the letter head and what was painted on the office, and their business card and circular." Passing upon these facts, the court said:

"There was nothing in the evidence of authority which Mr. Miller saw, and upon which he relied, to warrant him in assuming that Mr. Berkey had any authority to buy mining machinery. So far as appearances went—at least appearances for which the defendant was responsible—the purchase of mining machinery was no part of the defendant's business; and there was nothing to indicate that Mr. Berkey was empowered to act outside of its business. There was no apparent authority in Berkey to buy this machinery; and in order to bind the defendant by his contract, the burden was on the plaintiff to prove that the purchase was specially authorized by it."

In the case at bar, as in the case above cited and quoted, plaintiff relies upon the appearance of MacLean's authority, as evidenced by the facts hereinbefore stated, and here, as there, it was shown that the sign was upon the door of the offices occupied by MacLean, with the knowledge of the vice-president and general manager of the defendant company, before the orders in controversy were received, and that defendant company furnished MacLean with some of its stationery, from which he had similar stationery printed, which he used with the acquiesence of defendant, with his own name as its agent appearing thereon, together with the address of his Denver office; but in the instant case it also appears, from defendant's stationery used by MacLean, that defendant was the manufacturer of, among other things, "Nitro Electric Fuses," and it can be well said here, as was said in *Gates Iron Works v. The Denver Engineering Works Company, supra,* that "as (MacLean) was held out as the agent of a manufacturer, his apparent authority extended only to the sale of the goods manufactured by his principal." Of course, the stationery of the defendant advertises it also as a "Dealer," but the fact that it appears as a manufacturer, and particularly of fuse, the product in controversy, was sufficient to at least put the plaintiff on inquiry as to the extent of the authority of its agent, with whom it was attempting to do business.

But further it was shown that MacLean traded in fuse, aside from his connection with the defendant company, and had a contract with Kearns, plaintiff's agent, in which he was appointed as Kearn's agent to sell 350 cases of fuse, and Kearns testified that under the contract, MacLean sold quite an amount of the fuse. Mr. Metzger, vice-president and general manager of the defendant company, testified that after MacLean's death, Kearns claimed all the proceeds collected by the MacLean estate from the sale of fuse, including that in controversy, and that he (Metzger) made claim for the proceeds collected from the sale of dynamite,

but none from the sale of fuse; that the defendant company never received any of the fuse sued for, nor the proceeds from the sale of any such fuse; that it never received a statement, bill or any notice from the plaintiff of any of the alleged sales, and that the first notice had by defendant of the claim made against it was when he (Metzger) was served with the summons and complaint in this case, after the MacLean estate had been settled.

But, even further, it was shown by the testimony of Kearns himself that he was well acquainted with MacLean for about a year or more before any of the sales were made, and knew then that the defendant company did not handle or sell fuse or caps in Colorado. He testified that MacLean said he expected Mr. Metzger, vice-president and general manager of the defendant company, "would be in Denver shortly, and he (MacLean) would like it arranged so that I could meet Mr. Metzger and impress upon him the necessity of their company handling fuse and caps; that he was not familiar with the trade, and that he was practically a new man with the trade, and that he was practically a new man with them, and it might have the desired effect. * * *."

Continuing, he testified, in part, as follows:

"Well, Mr. MacLean and I had more than one conversation; we had two or three, or a half dozen along those lines at different times. * * * when Mr. Metzger came to Denver, Mr. MacLean advised me, and the next morning I went to their office, 51 Bank Block, and Mr. Metzger, I believe, was there at the time, or came in very shortly afterwards—I believe he was there when I came in— * * * and we three went into the back office and talked over the situation, I think, for a full hour or more, and I explained to Mr. Metzger my experience in handling powder in Colorado, and the necessity of powder companies selling fuse and caps; I was interested particularly in the sale of fuse and caps, because I could make a profit by selling to the Nitro Powder Company, and he agreed with me. After

we left the little office, the small inner office, we came out in the outer office, Mr. Metzger and myself, and Mr. MacLean remained seated, and we stayed there by a window *. * *. I stated I might do some powder business with Mr. MacLean later, and that I could exchange fuse with him for powder, and I also explained this new fuse we had, the Seal of Colorado—no one else had a right to make it—and he went on buying this fuse from me. Nothing further was ever said or done in connection with the matter."

It would appear from this testimony that Kearns and, through him, the plaintiff company had knowledge of the limited authority of the agent MacLean, notwithstanding what the evidence of his apparent authority might have been. It is clear that they knew the defendant company did not deal, in Colorado, in fuse and caps, and therefore that MacLean could have no authority to bind it for the purchase or sale of such articles without its act or consent. Kearns, it would seem from the testimony quoted, with this knowledge, undertook to influence the defendant company, through its vice-president and general manager, to engage in the handling of these products in Colorado, and thereby extend the limited authority of MacLean, so that he and Kearns could do business; but nothing in Kearn's testimony, or any other part of the record, shows that the company or its general manager ever consented to such an extension, or did anything to justify Kearns in a belief that such an extension was granted, and no further inquiry is shown to have been made on the part of the plaintiff to ascertain the real extent of MacLean's authority, or to dispel any doubts that Kearns might have entertained in the matter. The most that can be gathered from Kearn's testimony is that Metzger agreed with him as to the necessity of Powder Companies selling fuse and caps, or that he (Kearns) could have made a profit by selling such products to the defendant company. Plaintiff does not contend that in the conversation between Metzger and Kearns, actual

authority was given to MacLean to buy or sell these products, but insists that in doing so he was acting within the apparent scope of his authority. Since the limited authority of MacLean was known to the plaintiff, it cannot hold the defendant liable for acts done within the apparent scope of his authority, but beyond its known limitations. *Salene v. Queen City Fire Ins. Co.*, 59 Ore., 297, 116 Pac., 1114, 35 L. R. A. (N. S.), 438; *Silver Mountain Co. v. Anderson*, 51 Colo., 305, 117 Pac., 173.

As was said in *Gates Iron Works v. The Denver Engineering Works Co., supra*, "the burden was on the plaintiff to prove the agent's authority and every fact which might tend to make his contract the contract of the principal; and in the absense of such proof, disproof by the defendant was unnecessary." We do not think the record contains the required proof to establish the agency or authority of MacLean to make the purchases charged; and therefore the court erred in refusing to grant defendant's motion for a non-suit, and its judgment should be, and is, hereby reversed.

Reversed.

[No. 4176.]

COLORADO SPRINGS & INTERURBAN RAILWAY CO. V. MERRILL.

1. NEGLIGENCE—*Contributory Negligence—Last Clear Chance.* Though the negligence of plaintiff has placed him in a position of peril, yet, if defendant observes his peril in time to avoid doing him injury, by the exercise of due care, and fails to exercise such care, the prior negligence of the plaintiff is not deemed contributory. The later negligence of defendant, he having opportunity to avoid the injury, is not only the proximate, but the sole cause of the injury, the prior negligence of plaintiff being regarded as having created only a condition, without which the injury would not have happened, and not as the cause of its occurrence. (385, 386.)

Anything conflicting with this in the opinion in *Denver Company v. Gustafson*, 21 Colo. App., 178, is overruled. (383.)

Defendants' car moving to the East, approached a street upon which plaintiff was walking to the North. From the moment of plaintiff's entry into the street upon which defendant's tracks were laid, the car was plainly to be seen; and the plaintiff likewise was in plain view of those upon the car. Plaintiff walked leisurely into the street, looking neither to the right or left, and giving no manifestation that she was aware of the approach of the car. Nevertheless, though her peril, and that she was unconscious of it, were manifest, the motorman gave no signal of his approach, and made no effort to check his speed until "right upon her." Plaintiff was struck by the overhang of the car, at the instant of passing the northernmost rail. *Held* that not withstanding plaintiff's negligence, in view of the reckless conduct of the motorman, the case was properly left to the jury. (383, 388.)

2. INSTRUCTIONS—*Construed.* Action by a pedestrian for an injury attributed to the reckless management of the street car of defendant, at a street crossing. The defense was the contributory negligence of plaintiff in attempting to pass the tracks, without looking in either direction. Defendant prayed an instruction to the effect that it was the duty of the pedestrian, in such case, to look out for himself, and exercise such care as a reasonably prudent person would exercise, under the same circumstances, and that if plaintiff failed to exercise this degree of care, they should find for defendant. To this the court added the words, "upon this question." The modification was not held misleading. (388, 389.)

Error to El Paso District Court. HON. W. S. MORRIS, Judge.

MESSRS. CHINN & STRICKLER, for plaintiff in error.

MR. W. D. LOMBARD and MR. W. N. RUBY, for defendant in error.

KING, J., rendered the opinion of the court.

Goldie Merrill brought this suit to recover damages in the sum of $5,000 for personal injuries sustained by her when struck by a car of the Colorado Springs & Interurban Railway Company, at the intersection of Kiowa and El Paso streets, in the City of Colorado Springs, Colorado. She had a verdict and judgment for $1800. The railway company, defendant below, now claims that the trial court erred in refusing to direct a verdict for it as defendant, and in giving certain instructions, to which it objected. Both objections have their basis in the contention that a recovery by plaintiff is barred by reason of her contributory negligence, without which the accident, with its attendant injury, would not have occurred.

Inasmuch as the verdict of the jury has determined the credibility of the witnesses, and the preponderance of the evidence, in favor of plaintiff, the facts necessary for an understanding of the question or questions to be considered must be found in the evidence introduced for the plaintiff, and so much of that introduced by the defendant as is not disputed.

Defendant had street car tracks running east and west on Kiowa street, which crosses El Paso street at right angles. The car which struck plaintiff was going east. As it approached El Paso street it could be seen for a distance of about thirteen hundred feet, by a person standing at the intersection of said streets, the view being unobstructed, with a slight exception produced by columns supporting an overhead crossing used by the Santa Fe Railway Company for its trains, which crossed Kiowa street about eighty-five feet west from the point where the accident occurred. The distance from the curb on the south side of Kiowa street to the street car track was 40-4/10 feet. Plaintiff was walking northward along the east side of El Paso street, and testified that when she reached the curb, and before stepping

into Kiowa street, she looked both east and west, but observed no car approaching. After stepping into the street she has no recollection of what occurred until she regained consciousness, some days thereafter in the hospital. It is shown by several witnesses, two of whom were in the front part of the approaching car, and one on the south line of Kiowa street, about two hundred feet west of the line of El Paso street, when the car passed him, that the plaintiff proceeded directly across the street and track, walking at an ordinary pace, looking neither to the right nor to the left; that immediately after she had stepped across the north rail of the track she was struck by the corner of the car overhanging the north side of the track; that the car was traveling about twenty-five miles an hour, and did not slacken its speed, nor did the motorneer make any effort to stop the car until it was within five or six feet of plaintiff; that when the car reached a point about two hundred feet west of the street intersection the plaintiff was within three or four feet of the south track, giving no indication that she was aware of the approach of the car, and that it was about one hundred feet from her when she stepped on the track; that a bell was being rung on the engine of a Santa Fe train then approaching the overhead crossing, but witnesses heard no bell or gong sounded on the car; that it was broad daylight, and nothing to hinder the motorneer from seeing plaintiff while she was approaching or as she stepped on the track. One of the witnesses riding on the car, attracted by the situation of the plaintiff, and apprehending her danger, stepped to the side of the motorneer and observed the accident, looking through the same window the motorneer was using, and testified that no effort was made to stop the car until it was "right onto" the plaintiff. The car could be stopped, by use of the appliances furnished, in twenty feet, if running from twelve to fifteen miles per hour, as testified by the motorneer; in sixty feet if running twenty-five miles

per hour. It ran about thirty-eight feet after striking plaintiff.

1. For the purposes of this review it may be conceded or assumed that the plaintiff was negligent, in that she did not exercise that ordinary care which the law imposed upon her to look and listen before attempting to cross the tracks of the defendant. It is clearly proven, and we think conceded by her counsel, that she did not look nor listen at a time or point when such act would have been effectual. It may further be conceded that such negligence of plaintiff was continuous and operative from the time she left the curb until she reached the railway track, or arrived at a point so near thereto that a passing car must strike her. After reaching the track it would appear that further advancing was taking her out of danger, and not into it. The railway company contends that under the evidence, with the foregoing assumption, the doctrine of the "Last Clear Chance" cannot be successfully invoked to fix liability upon it, for the reason that there was no negligence of the company supervening subsequently to that of plaintiff—that their concurring negligence resulted in the injury—citing in support of its contention the case of *Denver City Tramway Co. v. Cobb,* 146 Fed., 41, 90 C. C. A., 449, with its copious citation of authorities, and also numerous other authorities, including *Denver City Tramway Co. v. Gustafson,* 21 Colo. App., 478, 121 Pac., 1015, and *Sagara v. Chicago, R. I. & P. Ry. Co.,* 58 Colo., 236, 144 Pac., 881; and further insists that the doctrine does not apply, because, as it is said, neither the plaintiff's negligence nor her position of danger or peril was observed by defendant's motorneer in time to avoid the injury. Under the "Last Clear Chance" doctrine, as adopted by the courts of this state, we think the application of the rule may be invoked by the plaintiff, even though her negligence, in not looking and listening for the approach of the car, may have been continuous and operative down to the very moment of the injury, provided the

evidence was such that the jury was warranted in believing that she was not aware of the approach of the car until such time as it was impossible for her to extricate herself from the predicament in which her negligence had placed her; and, on the other hand, in believing that defendant's motorneer saw plaintiff's position of danger in time to avoid the injury, as an ordinary prudent person should have apprehended her peril, had control of the situation, and did not take the action necessary to avoid it. The rule as adopted in many of the American states as well as in England in cases of this kind seems to be that, notwithstanding the negligence of the plaintiff had placed her in a position of peril, nevertheless, if thereafter the defendant observed the peril to which she was subjected, and still had time, by using due care, to avoid the injury, then the prior negligence of plaintiff should not be deemed as contributing to the result, because it was in no just sense the proximate cause of the injury; that the later negligence of defendant, when it had a chance to avoid the injury by the use of due care, would be not only the proximate cause, but the sole cause of the harm; the prior negligence of plaintiff being regarded as having created only a condition without which the injury would not have happened, but not the cause of its occurrence. An interesting discussion of this question is found in Modern American Law, volume 2, section 69 *et seq.* Such we understand to be the interpretation of the rule by Mr. Justice Gabbert in *Nicholas v. C. B. & Q. R. R. Co.*, 44 Colo., 501, 98 Pac., 808, the facts of which are sufficiently similar to those in the instant case to make that decision a precedent for this. We quote from pages 515, 516 and 517 (pages 814, 815, 98 Pac.):

"The principle underlying these propositions is, that the party who has the last opportunity of avoiding injury must prevent it if, by the exercise of reasonable care, he could do so, and if he does not, it is his negligence in this respect, and not that of the one first in fault, which is the

proximate cause of the injury. * * * The duty to exercise due care to avoid the consequences of another's negligence arises when the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. * * * It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed, but it is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precautions as a prudent man would take on similar notice. * * * Ordinary care on the part of an engineer requires vigilance to guard against a dangerous situation reasonably to be apprehended, as well as one actually imminent, so that it becomes the duty of an engineer, when he sees a pedestrian approaching a public crossing, under circumstances which would lead him to believe, as an ordinarily prudent person, that such pedestrian is not aware of the approaching train, to take such steps as an ordinarily prudent person would, under similar circumstances, to prevent the traveler from placing himself in a situation of danger from which it will be impossible to extricate himself. (Citation of cases.) * * * It is evident that plaintiff stepped upon the track without being aware of the proximity of the locomotive. He had given no indication that he was aware of its approach. He was in peril when he approached the track, without looking the second time to the south, before he stepped upon it. True, it was not imminent until he stepped upon the track, or approached it near enough to be struck, but the employees of defendant on the engine had that knowledge of his movements and proximity to the track which the exercise of reasonable care would have imparted. From this knowledge they may not have been able to determine definitely that he was approaching the track without knowledge of the approach of the engine, but if from his behavior and all the circumstances it should have occurred to them, as reasonably prudent and intelligent persons, that he did not, then they had notice of the danger to

which he was exposed, and it would have been their duty to take such steps as reasonably prudent persons would and could, under similar circumstances, to prevent the engine striking him, if, in the exercise of such care and taking such steps, his injury could have been avoided."

Applying the rule as there announced to the circumstances of this case, it is clear that there was sufficient evidence to sustain a finding by the jury that defendant's motorneer observed the plaintiff approaching the track, under such circumstances that an ordinarily prudent person should have known or judged that she was in peril, but unconscious of the impending danger; that the motorneer had control of the situation, and had knowledge of it in plenty of time to avoid the injury by using the appliances at his command; that he did not thereafter exercise due care, and therefore defendant is liable. The evidence makes the case peculiarly one for determination by a jury, and its findings should not be disturbed.

Neither the decision nor the views expressed *arguendo* by this court in *Denver City Tramway Co. v. Gustafson, supra,* are controlling in this case. We there expressly held that the "Last Clear Chance" doctrine was not involved, inasmuch as the jury was not instructed on that subject. But if anything in that opinion conflicts herewith, it may to that extent be regarded as overruled. We find nothing in the Sagara case, *supra,* to conflict with the conclusions we have reached. It is there said that the rule is "reasonable and humane." See also *Catlett v. Colorado & Southern Ry. Co.,* 56 Colo., 463-476, 139 Pac., 14.

2. The objection urged to the instructions given will be understood by quoting No. 12, which reads as follows:

"The court instructs the jury that it is the duty of a pedestrian about to attempt to cross the tracks of a street railway company to look out for himself or herself, and to exercise such ordinary care as would be exercised by a reasonably prudent person under the attending circumstances.

If you should find and believe from a preponderance or greater weight of the evidence that the plaintiff, before stepping upon the car tracks of the defendant, failed to exercise the care above mentioned, then you should find in favor of the defendant *upon this question.*"

The objection made and argued is that it was error to add the words italicized. The defendant, by its request No. 5, submitted the identical instruction quoted, with the exception of the words "upon this question." Counsels' contention may be best understood by quoting from their brief as follows:

"We respectfully insist that the trial court committed reversible error in adding to the defendant's various requests the words 'upon this question' or 'upon this proposition,' and giving the same, as so amended, as instructions to the jury."

We do not agree with counsel as to this objection. Each of such instructions stated a distinct and separable element, proof of which would tend to defeat plaintiff's cause of action, but either might be found in favor of the defendant, and yet plaintiff would be entitled to prevail upon the theory of the "Last Clear Chance." In other words, the jury might have found for the defendant upon either or all of the questions submitted in the instructions objected to, upon the question of the concurring negligence of the plaintiff, and still have found for the plaintiff, because the defendant had a clear chance to avoid the accident. Perhaps words might have been chosen that would more clearly express the meaning of the court, but we think the jury could not have been misled as to the meaning, for it seems clear that the words "upon this question" had reference to the duty of the plaintiff, and the ordinary care that must be exercised by her, failure of which would constitute negligence.

Finding no error, the judgment will be affirmed.

[No. 4179.]

STEARNS V. JEWEL.

1. CONVEYANCES—*Covenant of Seizin*, in a conveyance of lands, imports that the grantor is in possession, and that the grantee shall succeed to such possession. If there is in fact an adverse possession of even a part of the premises, the covenant is broken as soon as made, and the grantee is entitled to an action against the grantor for the reasonable expense of expelling the intruder. (392, 393.)

That the conveyance contains, also, a covenant to warrant the title, against all "lawful claims," has not the effect to impair his right of action.

2. —— *Disseisin—Possession by Mistake of Boundary*, by one not claiming title, is not adverse. The title in such case draws to it the possession. The possession by mistake is no breach of a covenant of seizin in the conveyance of the true owner.

And the subsequent refusal of possession, by the one so in actual possession, has not the effect to give an action upon the covenant. To effect a breach of the covenant there must be an adverse possession at the date of the conveyance. (395-398.)

3. —— *Covenant of Warranty*, against "all lawful claims" is not broken by an unlawful possession then existing. (399.)

4. EVIDENCE—*Burden of Proof*. In an action upon the covenant of seizin, where an adverse possession is alleged and denied, the plaintiff has the burden of proving the possession alleged, and that it was adverse. (399.)

5. LAW OF PLACE—*Covenants for Title. Semble.* That an action lies in our courts for the breach of the covenant of seizin in a conveyance of lands situate in another state.

Error to Morgan District Court. HON. H. P. BURKE, Judge.

MR. T. M. MORROW, for plaintiff in error.

MR. JAMES E. JEWEL, for defendant in error.

MORGAN, J.

Jewel had judgment in his action against Stearns to recover damages for breach of covenants in a conveyance of land. Stearns assigns error to the order overruling his demurrer to the complaint, to the order sustaining a de-

murrer to his answer, and to the entry of judgment against him, which will be considered in the above order.

First, the plaintiff alleged that the defendant gave him a warranty deed, setting out a copy of it, conveying some Nebraska land, with the following covenants:

"And we do hereby covenant with the said grantee, and with his heirs and assigns forever, that we are lawfully seized of said premises; that they are free from incumbrances except taxes for the year 1911 and thereafter; that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever."

That when the deed was given, Humphrey Smith was, and that defendant knew it, in actual, adverse possession of 20 acres of the land, and had it fenced. That as soon as he learned, which was about one year after the deed was given, that Smith was in possession, he demanded possession of him, which was refused, and that he then requested the defendant to dispossess Smith, and deliver possession to him, which the defendant refused to do. That plaintiff then sued Smith and recovered the possession. That by reason of the breach of the covenants aforesaid the defendant became indebted to him for his expenses in said suit against Smith, stating the amount.

It is contended that the deed does not contain any covenant of possession, and contains no warranty against unlawful claims. It seems unnecessary to consider the contention that the deed contains no warranty against unlawful claims, as the plain language of the covenant of warranty is to defend "against the lawful claims of all persons whomsoever." The contention in the briefs, both upon the demurrer to the complaint and the demurrer to the answer, arises upon the meaning of the words "lawfully seized." These words, like "livery of seisin," do not mean anything in this age, other than what they have been construed to

mean by judicial decisions, and as defined by text writers. It is unfortunate that they are now used in a deed at all. There is not one seller or purchaser of land in a dozen who knows what a covenant of seisin is. Such words as seisin, fee simple, hereditaments, indenture, these presents, indefeasible estate of inheritance, and other ancient terms have long since outlived their usefulness in conveyancing, and by legislation should be displaced by modern substitutes that disclose a meaning to the ordinary business man. Common understanding between a seller and buyer of anything would lead the purchaser to believe that the seller could and would deliver, not merely the right to the thing sold, but the thing itself. When a man buys a thing he does not anticipate that he will have to sue for the possession of it. However, the seller and buyer of this land put their agreement into a deed containing certain covenants, one of which is that the seller was "lawfully seized" of the premises conveyed, and, under the law, they are bound by the terms used. If the deed had stated that the grantor had good title and could and would deliver to the grantee the actual possession, or its equivalent, it would have expressed a proper understanding, unless the seller did not intend to covenant to that extent.

Deeds usually contain covenants, concerning seisin, good right to convey, quiet enjoyment, against incumbrances, followed by a general warranty. The deed under consideration contained no other covenants than the above quotation from it, but it is believed that it contains, under a proper construction, all of the usual covenants, only one of which, however, if any, was broken; that is, according to the allegations of the complaint, and that is the covenant of seisin. The authorities are all to the effect that "lawfully seized" includes right to convey, and none of them go quite so far as to say that the idea of possession, actual or constructive, is eliminated. So, with no other covenant of possession, the term "lawfully seized," as used in the deed

herein, ought to be construed to include it. "Livery of seisin" at common law, from which term the word "seisin" in our deeds is unquestionably derived, meant delivery of actual possession; and to divorce the word "seisin" from all idea of possession, as contended for, would be contrary to ordinary legal rules of construction. Webster defines "seisin" by the one word, "possession." The authorities distinguish between seisin in deed or in fact, which they call actual possession, and seisin in law, which they define as the right to immediate possession. In *Jenkins v. Fahey,* 11 Hun., 351, it is said that seisin at common law signifies possession. In the case of *North. Pac. R. R. v. Cannon* (C. C.), 46 Fed., 222, 232, it is said that seisin means possession. The word seisin, under the authorities, includes also the covenant of "right to convey," but as this deed contains a separate covenant of the right to convey, it seems plausible that the words "lawfully seized" were intended to refer to possession alone.

Devlin on Deeds (3rd Ed.), sec. 889, says:

"Unless there is some statutory regulation to the contrary, the rule is that a covenant of seisin, where the grantor has no possession, either actual or constructive, is broken as soon as made."

This text is supported by decisions disclosing the weight of authority of the present day, among which is the case of *Hayden v. Patterson,* 39 Colo., 15, 18, 88 Pac., 437, in which it is said:

"Where a grantor conveys land to which he has no title, particularly if he is out of possession, his covenants of seisin and right to convey are broken as soon as made."

The same was held in *Adams v. Schiffer,* 11 Colo., 15, 36, 17 Pac., 21, 7 Am. St., 202. There it is said:

"The covenant of right to convey amounts to a covenant of seisin; they are synonymous. The principles and practice applicable to the one apply to the other. 3 Washb. Real Prop., 448; Will. Real Est., 415; *Rickert v. Snyder,*

9 Wend., 421. There was no breach of this covenant, as, at the time of the conveyance, Adams was in possession of the property conveyed, and had a right to convey, within the meaning of the covenant. 3 Washb. Real Prop., 449."

The same was held in a later case, *Seyfried v. Knoblauch,* 44 Colo., 86, 90, 96 Pac., 993.

In the case of *Allen v. Allen,* 48 Minn., 462, 51 N. W., 473, the court said:

"A covenant of seisin is broken if the covenantor has not the possession, the right of possession and the complete legal title."

The above language is taken from the case of *Fitzhugh v. Croghan,* 2 J. J. Marsh. (Ky.), 429, 19 Am. Dec., 139, cited in Rawle on Covenants for Title, p. 58.

In the case of *Pierce v. Johnson,* 4 Vt., 247, the court said:

"That the covenant of seisin is satisfied by possession without title, cannot be well reconciled to sound reason, except when applied to the naked covenant of seisin without any words that imply any other right but mere possession."

It follows, therefore, that as Smith was in the actual adverse possession of part of the land when the deed was made, as distinctly alleged in the complaint, the defendant could not have been in either the actual or constructive possession thereof, and the covenant of seisin was broken as soon as the deed was made, and the demurrer was properly overruled.

Second, the answer discloses a different state of facts. It stated that Smith was not in the adverse possession of the 20 acres, disclosing that the covenant of seisin was not broken, as appears from the allegation of the complaint, and stated a cause of defense, and an issue was thus made as to what kind of possession Smith held when the deed was made. The answer sets forth a state of facts showing that Smith was not in the adverse possession claiming absolute ownership of the 20 acres, but was in the conditional pos-

session thereof, believing it was a part of his own land, with no intention to claim it as his own, if theboundary line between him and the plaintiff's land was at a different place from where he thought it was. If the legal title of the covenantor drew to it the constructive possession, as in the case of vacant and unoccupied lands, then the covenant of seisin, according to the answer, was not broken, and it was error to sustain the demurrer, and for this reason the case must be reversed.

It may seem, on first impression, that the legal title does not draw to it the constructive possession of land which is in the actual possession of another, and that this is true only in case of vacant and unoccupied land; but it conclusively appears from the authorities that this is true even as to land occupied by another, if such occupation is such as that described in the answer.

It is said in the case of *Slater v. Ralston*, 6 Metc., 439, 444:

"If there is a tortious possession, not amounting to a seisin, the constructive possession as between the tortfeasor and the party having the legal title is considered as continuing in him who has the right."

It is said in *Ft. Dearborn Lodge v. Klein et al.*, 115 Ill., 177, 183, 3 N. E., 292, 56 Am. Rep., 133, that:

"We desire to emphasize the statement that mere occupancy does not constitute seisin in the legal sense of that term, even in the case of a tortious or unlawful seisin. One may be in the occupancy of land as a mere squatter without any pretense of claim, when, in contemplation of law, even the possession is in another. * * * It will, however, be sufficiently accurate for the purposes of the present discussion to define possession in the connection indicated, to be that position or relation which one occupies with respect to a particular piece of land which gives to him its use and control, and excludes all others from a like use or control. * * * Seisin, then, in a legal sense, means pos-

session with the intention of asserting a claim to a freehold estate in the premises added."

Applying the same law as contained in the authorities cited under the first contention, that the covenant of seisin contains not only possession, but title, and considering the allegations of the answer as proved, Smith was not seised of the 20 acres as to the true owner, his possession did not amount to a disseisin; therefore Stearns, before conveying, and Jewel, thereafter, was seised of the 20 acres. According to the Slater case, *supra*, Smith was seized as to all the world, except as to the true owner. In other words, unless the possessor of the land holds adversely to the true owner, the legal or constructive possession is in the true owner; and, as Devlin says, if the actual or constructive possession was in the grantor at the time of the conveyance, the covenant of seisin is not broken.

It is stated in 1 Cyc., 1037:

"According to the great weight of authority, where the occupation of the land is by a mere mistake, and with no intention on the part of the occupant to claim as his own, land which does not belong to him, but he intends to claim only to the true line wherever it may be, the holding is not adverse."

In *Grube v. Wells*, 34 Ia., 148, it is said:

"An essential ingredient of adverse possession is a claim of right hostile to the true owner. So if one enter upon the land of another, without any color of title, or claim of right, the possession thus acquired is not adverse, but the possessor will be deemed by the law to hold under the legal owner. In such case no length of possession will make it adverse."

In *Worcester v. Lord*, 56 Maine, 266, 96 Am. Dec., 456, the court said:

"To make a disseizin in fact there must be an intention on the part of the party assuming possession to assert title in himself."

In *Preble v. Maine Central R. R. Co.*, 85 Me., 260, 27 Atl., 149, 35 Am. St., 366, 26 L. R. A., 829, 834, it is said:

"If, on the other hand, a party, through ignorance, inadvertence, or mistake, occupies up to a given fence beyond his actual boundary, because he believes it to be the true line, but has no intention to claim title to that extent if it should be ascertained that the fence was on his neighbor's land, an indispensable element of adverse possession is wanting. In such a case the intent to claim title exists only upon the condition that the fence is on the true line. The intention is not absolute, but provisional, and the possession is not adverse."

In *Schad v. Sharp*, 95 Mo., 573, 578, 8 S. W., 549, the court said:

"It is the well settled law in this state that when two adjoining proprietors are divided by a fence which they suppose to be the true line, each claiming only to the true line, they are not bound by the supposed line, but must conform to the true line when ascertained. *Jacobs v. Mosely*, 91 Mo., 118; *Thomas v. Babb.*, 45 Mo., 384. 'Their possession under mistake or ignorance of the true line dividing their premises, and without intending to claim beyond the true line when discovered, will not work a disseisin in favor of either party.' *Houx v. Batton*, 68 Mo., 84; *St. Louis University v. McCune*, 28 Mo., 451."

The case of *Grube v. Wells, supra*, has been followed in a number of later Iowa cases cited in the latest case of *Griffin v. Brown*, 149 N. W., 833.

The weight of authority is in accordance with the Iowa cases, and the same principle has been announced in this state. In the case of *Evans v. Welch*, 29 Colo., 350, 363, 68 Pac., 776, it is said:

"Defendants recognize the rule that the ownership of the fee draws to it a constructive possession, and that such constructive possession continues until it is destroyed by an actual adverse possession."

It is said in *Beaver Brook Co. v. St. Vrain Co.*, 6 Colo. App., 130, 134, 40 Pac. 1066, although on a reverse state of facts, that:

"If the intention was to show constructive possession by reason of title, there was a misconception of the law of the case. The rule of law is well settled that there can be no constructive possession by virtue of title when there is an actual *adverse holding*." (Italics mine.)

If it be supposed that Smith had sued Jewel for the possession of the 20 acres, and had recovered, under the usual rule, Stearns would have been liable to Jewel; but under the answer, such recovery would have shown that the fence was in the right place, and that Smith had never claimed any of the land conveyed. So it appears that the only issue, between the parties in the suit between Jewel and Smith, was the location of the boundary line, although the suit was in ejectment.

It seems clear that if a grantor be in the actual or constructive possession of land, his covenant of seisin is not broken by the mere fact that another is in possession, unless such possession is antagonistic and adverse. The answer stated facts sufficient to show that the possession of Smith was not antagonistic or adverse to Stearns, at the time the deed was made, and hence the covenant of seisin was not broken, if the facts so stated are true, which must be determined by a trial.

The refusal to deliver possession to Jewel by Smith, which is admitted in the answer, took place one year after the deed was made, and even if such refusal could be considered as evidence of an adverse possession, it would be too late to come within the covenant of seisin, but would possibly come within the covenant of quiet enjoyment, or warranty, provided the refusal was based upon a claim of ownership and not upon uncertainty as to the dividing line. The adverse holding in order to constitute such a possession as would effect a breach of the covenant of seisin, must be a

possession held at the time the deed is made. This is illustrated in the case of *Gay v. Mitchell,* 35 Ga., 139, 141, 89 Am. Dec., 278, where it is said:

"Possession that in its commencement is not adverse becomes so only when the holder changes his mind or intends it to become adverse, and there is united with such change an intent and knowledge thereof on the part of the true owner."

However, this refusal on the part of Smith would not even come within the covenant of warranty, because it was not an unlawful claim, as shown by the judgment set forth in the complaint. The warranty was against lawful claims only.

On another trial the plaintiff may deny the statements of the answer as to the kind of possession, whether adverse or not, or the court may consider the issue sufficiently drawn by the complaint and answer, and such issue of fact may be determined; and it seems the burden of proof would be upon the plaintiff. *Evans v. Welch, supra; Upham v. Weisshaar,* 23 Colo. App., 277, 280, 128 Pac., 1129.

There is another issue formed by the pleadings which furnishes another reason why it was error to sustain the demurrer to the answer—the issue as to the expenses. Plaintiff alleged that he had expended a certain sum of money in the lawsuit ejecting Smith, and defendant denied it; and if the court or jury should find the facts as to Smith's possession as alleged in the complaint, the issue as to the expenses, especially the amount thereof, would have to be determined; if the court or jury should find the possession of Smith was as alleged in the annwer, the expenses would then become immaterial, and judgment would go for the defendant.

The judgment is therefore reversed, with directions to overrule the demurrer to the answer, and for further proceedings in accordance with this opinion.

[No. 4180.]

GEORGE v. WILLIAMS.

1. PROMISSORY NOTE—*Cotemporary Parol Agreement as to Payment.* Of even date with a promissory note the maker subscribed for a share of stock in the corporation named as payee therein. In an action upon the note by an assignee after maturity, it was *held* that a parol agreement, cotemporary with the execution of the note, and upon the faith of which it was executed, to the effect that the note would be paid from the maker's share in the dividends of the corporation, and not otherwise, was a complete defense to the action. (403-405.)

2. EVIDENCE—*Parol Admissible,* to show an agreement, cotemporary with the execution of a promissory note, as to the manner in which it should be paid, the action being by an assignee who took subsequent to maturity. (405.)

3. CONTRACTS—*Construed.* Of even date with a promissory note, an agreement was framed to the effect that dividends accruing to the maker upon a share of stock in the corporation named as payee, should be applied upon the note, and that "if said dividends shall not have fully paid said note at maturity, the same may be extended for one year." *Held,* that the note was not automatically extended by a deficiency in the dividends to discharge it. (411.)

Error to Mesa District Court. HON. THOS. J. BLACK, Judge.

MESSRS. BURGESS & KINARD and MR. STRAUD M. LOGAN, for plaintiff in error.

MESSRS. GRIFFITH, WATSON & SMITH, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

The amended complaint was filed in the court below February 8, 1913, the plaintiff therein being plaintiff in error, and the defendant, defendant in error here. It appears therefrom that on March 26, 1912, The Union Trading Company, a domestic corporation, executed and delivered its trust deed to Stanley B. Coffin, trustee, upon all the real estate belonging to the company; that on the same

day, by a certain agreement and pledge in writing, the company transferred, delivered and pledged to the said Coffin, as trustee, all the notes then held and owned by it, aggregating the principal sum of $46,000, to secure the payment of certain promissory notes executed and delivered by the company, aggregating the sum of $25,000; that by the terms of said agreement and pledge the trustee was authorized to collect all of said notes held and owned by the company, and delivered to him as aforesaid, with the interest due thereon, and apply the net proceeds thereof to the payment of the said $25,000 evidenced by the promissory notes of the company as stated; that on October 12, 1912, said Coffin, trustee, resigned his trust, and Harry C. George, plaintiff herein, was substituted by the beneficiaries in the place of said Coffin, and succeeded to all the rights, privileges, duties and obligations of said Coffin, with full power to act in his place and stead; that among the notes held and owned by the said company as aforesaid was one which is the basis of this action, and reads as follows:

"$100.00 Pueblo, Colorado, June 13, 1910.

On or before January 1st, 1912, for value received, I promise to pay to

THE UNION TRADING COMPANY

or order, the sum of ONE HUNDRED DOLLARS, with interest at the rate of 10 per cent per annum from date until paid, Principal and interest payable at the office of the company at Pueblo, Colorado.

David Williams,
P. O., R. F. D. No. 3, Grand Junction,
No. 29. Colorado.

Pueblo, Colorado, June 13, 1910.

In consideration of the execution of the above note, certificate of stock No. 288, for one share of UNION TRADING COMPANY stock has been issued to DAVID WILLIAMS, and the same is hereto attached, as security for the payment of said note, principal and interest.

And it is mutually agreed that all dividends accruing to the said DAVID WILLIAMS on said stock and on patronage during the life of said note, shall be applied to the payment of the same. It is further agreed that if said dividends shall not have fully paid said note and interest, at maturity, the same may be extended for the further period of one year.

THE UNION TRADING COMPANY,

By S. Z. Szhenck,

David Williams.";

that no part of such note had been paid, except the sum of $7.66, which sum was credited thereon as arising from stock and patronage dividends, in pursuance of the collateral agreement accompanying the note.

Answer was filed by defendant Williams, containing three defenses, two of which were eliminated by the court during progress of the trial, leaving the third defense stand. This defense, in substance, admitted the execution and delivery of the note by defendant, and its non-payment, but pleaded, as a defense, that the note was given by him in payment of one share of the company's stock, but upon condition, consented and agreed to by the agent of the company, at the time of its delivery, that the defendant Williams should not be required to pay any cash thereon, and that he should have the right to pay the entire note out of stock and patronage dividends, thereafter to accrue to him; that payment of the instrument was to be made solely out of such dividends; and that the plaintiff, and the beneficiaries mentioned in the trust instrument had full knowledge and notice of such agreement and condition, at the time the instrument sued on was assigned or delivered to the trustee for collection as aforesaid.

The case was tried to a jury and verdict rendered in favor of defendant, upon which judgment was rendered. Exceptions were reserved and the case was taken to the Supreme Court by proper proceedings, and is now before

this court for determination by lawful transfer from that court.

It appears from the record and briefs that the court tried the case upon one issue only, and that was, whether or not there was a contemporaneous agreement between the maker and payee of the note, at the time it was executed and delivered, that the same was to be paid only out of stock and patronage dividends subsequently to accrue.

In support of the third defense pleaded, defendant, over the objection of plaintiff, was permitted to give testimony to the effect that, simultaneously with the signing of the instrument sued on, the trading company's agent, Mr. Hughes, stated to him that the instrument was different from a promissory note, and that his only purpose in urging defendant to sign the same was to insure his patronage with the trading company; that defendant would not have to pay any cash, or ever pay a dollar, but that, before the end of 1913, defendant would have a share of stock in his possession, all paid out of patronage; that there would be 40% of net profits in patronage, and an equal per cent. in dividends on the stock; that defendant would pay out the $100 in patronage and dividends; that if not paid in 1912, at the date of its maturity the note would be extended for one year, and he (Hughes) would guarantee it would be fully paid off; that defendant positively refused to sign any note for the stock, whereupon the agent Hughes told him he only wanted defendant to sign the note for the purpose of securing the defendant's patronage at the company's store; that upon these statements being made by Hughes, defendant, relying thereon, signed and delivered the instrument; that defendant never had any notice of any dividends coming to him from the company; and that defendant patronized the company's store at all times from the delivery of the note until it closed its doors and ceased to do business.

The court, by its instruction No. 2, instructed the jury substantially that if they believed from the evidence that

the said contract note was signed and delivered by the defendant Williams with the understanding and agreement between him and said Hughes that the instrument should be paid for only out of dividends thereafter accruing upon stock, and that defendant would not be required to pay any cash thereon, then they should find for the defendant; but if they should find from the evidence that the contract was not signed with any such understanding and agreement, their verdict should be for the plaintiff. If the testimony of the defendant Williams, and other witnesses, tending to establish the condition upon which defendant executed and delivered the instrument, as pleaded by him in the third defense, was admissible and proper, then the judgment should not be disturbed, as the evidence of such condition was sufficient to establish the same, although controverted, the jury finding in favor of defendant upon that issue; but if such testimony was improper and violative of the rule next hereinafter referred to, the judgment should be reversed.

The real nub of the controversy involves the interpretation and application of the well established rule that a written contract cannot be contradicted or varied by evidence of an oral agreement between the parties, made before or at the time of such contract. Our own Supreme Court has repeatedly recognized the rule, and it is so well understood that citation of authorities may be dispensed with. However, it is well known that since the time the rule was first promulgated, and followed by the various appellate courts of this country, many exceptions have been grafted thereon. In fact the exceptions are so far reaching that it may be said, in the language of a distinguished jurist, that "the exceptions indeed have in many instances almost eaten out the heart of the rule itself." We will not attempt to enumerate all the numerous exceptions. Some may be found in the cases hereinafter cited. In proceeding to discuss this feature of the case we suggest that the

authorities are in decided conflict as to whether or not, in a case of this kind, parol evidence of a condition or agreement between the contracting parties, made simultaneously with the execution and delivery of the written instrument, is admissible in evidence as a defense to an action on the written contract.

In the well-considered case of *Norman v. McCarthy*, 56 Colo., 290, 138 Pac., 28, Justice Musser, speaking for the court, held that parol testimony of a contemporaneous agreement between the parties to a written contract, had at the time the contract was executed, was admissible in evidence as a defense to the contract, if such testimony tended to show that the check in issue was not intended to be payable unless the maker should thereafter recover judgment in a certain suit then pending.

In *Sayre v. Leonard*, 57 Colo., 116, 140 Pac., 196, a similar question was before the Supreme Court, and the *Norman v. McCarthy* case was cited, approved and followed.

In *Bourke v. Van Keuren*, 20 Colo., 95, 36 Pac., 882, the controlling question before the court was as to the admissibility and legal effect of certain oral testimony which, it was claimed, altered the legal meaning of the written instrument which was the subject of the action. The testimony was held admissible. The court said, in part:

"An oral stipulation may always be shown that the instrument was not to become of binding force unless some condition precedent was previously fulfilled. * * *

We think, therefore, that the oral testimony introduced was admissible to show the condition upon which the written agreement signed by appellee was to become effective, if at all."

To the same effect, *Brewing Co. v. Barets*, 9 Colo. App., 341, 48 Pac., 834.

None of the cases heretofore cited involve facts which can be said to be entirely similar to those disclosed by the record in the case at bar, but they all involve the applica-

tion of the general rule above stated, with some form of exception thereto.

But in the case of *Roberts v. Greig et al.*, 15 Colo. App., 378, 62 Pac., 574, we discover a state of facts noticeably similar in effect and import to those found in the case at bar. In that case a promissory note for $588 was executed and delivered by Lomax, Greig and Harris, makers, to one Hill, payee, payable one year from date. Hill indorsed the same, after maturity, to appellant Roberts, who brought suit against the makers for the unpaid balance thereon. The execution and delivery of the note was not controverted by the makers, but they defended the action on the ground that at the time of such execution and delivery there was a distinct understanding and agreement between the makers and the payee that the note was to be paid only out of the future proceeds of a mill owned by the company, and if there were no earnings from the mill, the note was to be returned and destroyed. The condition or agreement alleged as a defense was proven by parol testimony on the part of the makers, over the objection of the payee, and the Court of Appeals held such testimony admissible in proof of the defense set up. After citing *Burke v. Dulaney*, 153 U. S., 228, 38 L. Ed., 698, 14 Sup. Ct., 816, and *Hurlburt v. Dusenbery*, 25 Colo., 240, 57 Pac., 860, the court said, in part:

"In other words, it is quite impossible for me logically to conceive of a difference between the two cases or between those two cases and the present. In all three of them, according to the testimony, the note was not to take effect as a note until the happening of an event in the future. In the *Dulaney* case the event which was the condition precedent was the opportunity to open up and develop the property and determine its value. If found satisfactory, then the note was to be the consideration price. In the *Dusenbery* case there was a direct agreement to pay so much for the running of a tunnel, yet the party proved that this

whole agreement was a part of a scheme to place the mines in London for a named consideration, and only in the event of a successful promotion were the parties to pay the owners of the property the expenses of running the tunnel. In the present case the parties were co-partners, and they took the property and assumed the debts, and as an added consideration were to pay Hill $586, providing the running of the mill produced that result, either gross or net. In other words, the completed delivery of the note was only to happen in the event the mill ran and money was gotten out of the operation."

In the case just cited, as well as in the one at bar, it will be noticed that the instrument sued on was strictly a negotiable promissory note, and contained all the elements to make it so, as required by the common law, as well as sec. 4647, Revised Statutes, 1908. In that case the contemporaneous agreement proven by parol evidence showed that the payee of the note could only enforce payment thereof in case sufficient proceeds should be obtained from future earnings of a mill. In the instant case the parol testimony proved that the note was payable only in case dividends should be realized from future business operations of the trading company. We find the facts and circumstances of the two cases so analogous in import that we feel safe in declaring the question here raised and discussed to be *stare decisis*. In support of the rule declared in the *Roberts* case may well be cited *Hurlburt v. Dusenbery, supra*. Both cases are strongly supported by other authorities.

In *Greenwalt v. Kohne et al.*, 85 Pa. St., 369, an action was brought upon a bond, and the defense was that it was executed and delivered only upon condition and understanding had at the time, between the parties thereto, that it was given for the purchase price of a lot; that if the obligor did not like the property, the obligee would take it back on request, and pay the former a premium, and the cost of improvements; and that no personal liability should attach

to the obligor for the purchase money, but that plaintiff should look solely to the property purchased for payment. The court held that parol testimony to prove such condition and agreement was admissible as a defense to the action. The appellate court, speaking through Justice Sharswood, said, in part:

"We are of opinion that the offers of evidence by the defendant below ought to have been received. It is agreed that the English rule excluding parol evidence to vary a written contract has not been adopted in this state in all its stringency. The exceptions, indeed, have in many instances almost eaten out the heart of the rule itself; but it is not altogether abolished, as may be seen in *Martin v. Berens*, 17 P. F. Smith, 459. * * * But from *Hurst's Lessee v. Kirkbride*, decided in 1773, reported by Chief Justice Tilghman in *Wallace v. Baker*, 1 Binn., 61—down to the present time, this court has uniformly held, that where, at the execution of a writing, a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, that parol evidence is admissible, though it may vary and materially change the terms of the contract. * * * It would be an affectation of learning to cite all the cases which establish this principle, but to those contained in the argument of the counsel of the plaintiff in error may be added *Miller v. Henderson*, 10 S. & R., 290, which is *instar omnium*, but may be noticed as a case on all fours with the one now before the court. There parol evidence was held to be admissible under the plea of payment to a suit on a bond against a surety, to show that he executed the bond under a declaration by the obligee, that his signing was mere matter of form, and that he never should be called on for payment. Chief Justice Tilghman says: 'The destruction of a written instrument by parol evidence may seem dangerous, and, in fact, it is so. But the community would be in a still worse condition if it were established as an

inflexible rule, that when a man's hand was once got to an instrument, no matter by what means, the door should be shut against all inquiry. The encouragement to fraudulent villainy would be so great under such a system that the consequences might be intolerable."

In *Juniata Building Association v. Hetzel,* 103 Pa. St., 507, the court said, in part:

"No principle is better settled than that parol evidence is admissible to show a verbal contemporaneous agreement, which induced the execution of a written obligation, though it may vary or change the terms of the written contract. Therefore, it was competent for the defendant to prove, if he could, that it was agreed before and at the time he signed the bond that it should not be resorted to until after the security of the mortgage was exhausted, and that the security of the mortgage was lost through the plaintiff's negligence."

In *Coal & Iron Co. v. Willing,* 180 Pa. St., 165, 36 Atl., 737, 57 Am. St., 626, the court said, in part:

"It is a plain fraud to secure the execution of an instrument by representations as to the manner in which payment shall be made, differing in important particulars from those contained in the paper, and, after the paper has been signed, attempt to compel literal compliance with its terms, regardless of the contemporaneous agreement without which it would never have been signed at all."

To the same effect, *Keller v. Cohen,* 217 Pa., St., 522, 66 Atl., 862.

Quin v. Sexton, 125 N. C., 447, 34 S. E., 542, was an action upon a promissory note, to which defense was made that its execution and delivery was accompanied by a distinct understanding between the maker and payee that the note was to be paid out of the proceeds of another and different note, when collected, and not otherwise; and that the other note was never paid. Parol evidence was admitted, over objection, to prove the defense set up. The

Supreme Court held the ruling proper, and that if the defense was so proven, no liability attached to the maker of the note.

There is another point presented by the record which of itself might warrant an affirmance of the judgment. It appears from the testimony that before defendant signed the note, the company's agent, Mr. Hughes, called on him several times at his farm, for the purpose of interesting him in the company, and that he first made effort to have defendant invest outright $100 in money. Upon defendant's positive refusal to do so, Hughes then solicited him to sign a note for that amount, payable in six months or a year, which proposition defendant with equal positiveness rejected, whereupon Hughes urged defendant to sign an instrument to insure his patronage at the company's store, stating that the company had a patronage plan that he could "get on." The following is part of defendant's testimony:

"Well, I says (speaking to Hughes), I don't propose to sign any note. Well, I read the note. I says, this is the same as a promissory note. Oh, you read further on, he says, read the bottom and so on to the end of it, and you will find it is different. I read it. Well, I says, do you say to me in good faith that this is just to insure my patronage with The Union Trading Company? He said yes, and just about in that line, and I signed the note, this instrument. * * * I traded (there) at all times until the doors closed."

If the jury believed this testimony and concluded therefrom that it was the understanding that the only purpose in giving the note by defendant was to insure his patronage, and in pursuance thereof defendant patronized the company's store at all times until its doors were closed, then that purpose had been accomplished, and no action could be maintained on the note. A similar situation to this has undergone a thorough examination and review of authorities in the case of *Divine v. The Western Slope Fruit Grow-*

ers Association, No. 4167 Colo. App., decided at this term, wherein Presiding Judge Cunningham has thoroughly considered the question involved. We adopt the authorities and reasoning of that case, which was to the effect that where a promissory note was executed and delivered for the single purpose of permitting the payee to use it as collateral security, which was done, and it appearing that the principal debt for which the note was deposited as collateral was paid, it was held that no action could be maintained on the note.

It is well to note at this time that all the cases hereinbefore cited or referred to involve actions between the original parties to the written instruments sued on, or between one of the parties and an assignee of the other, who had full knowledge of the vices or defects of the written instrument; or, in cases of negotiable instruments, between one of the original parties and an assignee of the other, who acquired his title thereto after maturity.

The record shows that the instrument here in issue was on its face payable on or before January 1, 1912; that it was negotiated to the trustee March 26, 1912; therefore he acquired title to the note after maturity, and was not a holder in due course. The note on its face nowhere provides for its renewal after maturity; but in the collateral condition accompanying the same it is provided that if the note is not paid at its maturity it may be continued for one year thereafter. It is pleaded in the complaint that the note was extended one year, which is denied in the answer. There is no evidenc in the record showing such extension or renewal. We do not think, under the situation disclosed, that the note was automatically extended by proof that it was not paid at maturity.

Some other questions are raised by the record and discussed in the briefs, but we deem them all ancillary to the main question already decided; hence, no further reference need be made to the same.

We find that no error was committed by the trial court in admitting evidence, and that the instructions were, as a whole, fair to both parties. The judgment will be affirmed.

[No. 4190.]

GREGG V. HAYES.

1. PLEADINGS—*Sufficiency—Defects of Form.* Bad grammar, surplusage and ambiguity are not fatal to a complaint. If enough can be culled therefrom to show that plaintiff is entitled to relief a general demurrer must be overruled. (414.)

The complaint examined and held sufficient to sustain an action to rescind the contract.* (414-417.)

2. BILL OF EXCEPTIONS—*Where Necessary.* Where there is no bill of exceptions the court of review will be unable to determine that the refusal of an instruction was in any way prejudicial to the defeated party. (417.)

Error to Denver District Court. HON. GEORGE W. ALLEN, Judge.

MR. FLOYD J. WILSON and MR. CHARLES H. BEELER, for plaintiff in error.

MR. EDW. R. MORRIS, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

This action was instituted August 19, 1913, plaintiff in error Gregg and Amanda O. Gale being defendants below, and J. E. Hayes plaintiff below. It appears from the allegations of the complaint that the action was one to rescind a contract, upon the ground, as claimed, that fraud

*Syllabus by Hurlbut, J.

had been practiced on plaintiff by defendants, in and about the negotiation and purchase by the former from the latter, of certain stock in a domestic corporation.

The case was tried to a jury, which returned a verdict in favor of plaintiff for $400, as well as a special verdict that defendant Gregg, in committing the tort complained of, was guilty of fraud and wilful deceit. Judgment was rendered upon the verdict in favor of plaintiff for the money found due, and also that defendant be committed to the county jail for a term of four months, to be released upon the payment of the sum stated in the judgment.

Exceptions were reserved by defendant, who prosecutes this writ of error, and the case is here by proper proceedings for determination. None of the evidence given at the trial is incorporated in the transcript or abstract of record. The controversy therefore is to be determined only upon the record proper. No brief has been filed by defendant in error.

But two questions are presented for determination: (1) Does the complaint state facts sufficient to constitute a cause of action, and (2) did the trial court commit fatal error in refusing to give an instruction on the measure of damage, tendered by defendant at the trial? As to the first question a general demurrer to the complaint was filed in the court below and overruled, whereupon defendant pleaded over by filing an answer, and went to trial upon the issues formed.

We have carefully read the complaint, and it is noticeably faulty and defective as a pleading designed to state plaintiff's cause of action in ordinary and concise language without unnecessary repetition, as required by the code. In his use of the tenses the pleader who drafted that instrument seriously jeopardized the sufficiency of the complaint. However, the demurrer admits all facts therein stated, if well pleaded; and if, upon a consideration of all the allega-

tions appearing in the complaint, there can be culled therefrom sufficient averments showing the plaintiff clearly entitled to relief, the complaint should be held good as against the demurrer, no matter how much superfluous matter may be contained therein or how ambiguous or disconnected the pleading may otherwise be.

Disregarding the averments in the complaint, which attempt, but fail, to properly plead the falsity of defendant's statements as to the value of the stock, and the amount of profits the company was earning at the time of the purchase of the stock by plaintiff, as well as some other averments subject to criticism, we think there are sufficient allegations remaining to state a cause of action, and entitle plaintiff to relief. From the complaint the following facts are made to appear:

The Gale-Lydon Auto Company was a domestic corporation engaged in the business of instructing and educating students in the method of operating, repairing and handling automobiles. On June 10, 1913, L. E. Gregg, defendant, was president, director and one of the largest stockholders of the company, and, at the date mentioned, in conjunction with Amanda O. Gale, another stockholder and director, had full and complete charge of its business operations, both being familiar with the earnings of the company, the extent of its indebtedness, and all matters pertaining to its business affairs. For some time prior to said date plaintiff Hayes had been a student of the company, paying tuition therefor. On May 30, 1913, the plaintiff entered the employment of the company, at a weekly salary. Between May 30th and June 10th defendants repeatedly solicited plaintiff to purchase stock of said company, assuring him that if he did so he would receive regular wages and steady employment, that the earnings and profits at that time were sufficient to insure plaintiff and the two defendants good average wages; that the company required more supplies and machinery to handle the growing busi-

ness, and if plaintiff would purchase such stock the money paid therefor would be invested for supplies and machinery needed by the company, and that the stock could be purchased for 33⅓ cents a share, but was worth more than that price. Plaintiff at the time asked to see the books of the company, in order to investigate and learn what it had in assets and the amount of its debts and liabilities, if any, and what profits it was earning; but defendants stated the books were at that time in the hands of the company's secretary, and not at hand. At that time defendants stated to plaintiff that there were no debts owing by the company, nor any liabilities outstanding against it; that it owned clear and free all the property then in use; that it then had contracts with students sufficient in number to pay a good average salary to plaintiff and defendants, and that they, as its officers, controlled all outstanding stock except one or two shares. Plaintiff believed and relied upon all, each and every of the statements and representations aforesaid made by defendants, and believed and relied upon the truth thereof, and was induced thereby to purchase, and did purchase ,on the 10th of June, 1913, twelve hundred shares of said stock, paying therefor the sum of $400 in money, receiving a certificate therefor. On July 12, 1913, defendants absented themselves from Denver, and remained absent for about two weeks thereafter, leaving plaintiff in charge of the premises, and during this period he became enabled to investigate the affairs of said company. On July 28th plaintiff first discovered and learned that the statements and representations aforesaid, made to him by defendants, upon which he was induced to buy, and did buy, the shares of stock aforesaid, were false and untrue; that nearly all of the $400 paid by him for the stock aforesaid was appropriated by defendants for their personal use; that the statements and representations made to him by defendants, to the effect that the company had no debts or other liabilities, as above stated, were false and untrue; and that the company

above stated, were false and untrue; and that the company was insolvent. After becoming possessed of such information, plaintiff elected to rescind, and did rescind, the contract of purchase of such stock, and on July 30th notified defendants in writing of such election, tendering back to them the stock at that time, and demanding the return of the money which he had paid therefor, but such demand was refused. At the time the statements and representations were made by defendants as aforesaid they each had full knowledge of the facts concerning the business of the company, the value of its shares of stock, the amount of its profits and earnings, and the amount of its indebtedness and liabilities then existing, and well knew that such statements and representations made by them at that time were false and untrue, and the same were made by them designedly for the purpose and with the intention of cheating and defrauding the plaintiff, and for the purpose of inducing him to purchase the stock and pay for the same as above stated. By reason of such false statements and representations, on the part of defendants, as above alleged, plaintiff was damaged in the sum of $400.

The facts just recited, and admitted by the demurrer, fairly show that defendants knowingly, wilfully and fraudulently, with the intent to cheat and defraud plaintiff, induced the latter to invest $400 in stock of the company upon the express understanding that the same should be applied to the purchase of supplies and machinery for the use of the company, which was not done; that plaintiff's failure to examine the books of the company, prior to his purchase of the stock, was excusable, by reason of defendants' statement before the purchase that the books could not be obtained at the time; and, further, that, with a like fraudulent intent, defendants induced plaintiff to purchase the stock aforesaid, in reliance upon their clear representations and statements, made at the time, that there were no debts or liabilities then existing against the company, the complaint

showing that such statements and representations were false, and that, at the time, the company was insolvent.

From the averments of the complaint as above detailed it is evident that the contention of plaintiff in error, that the complaint is fatally defective as against the general demurrer, is untenable.

As to the second question discussed by plaintiff in error, concerning the action of the trial court in refusing to give an instruction upon the measure of damage, tendered by him, it appears from the record that no instruction was given by the court upon that subject, and none offered except the one referred to, which reads as follows:

"The court instructs the jury that the measure of the plaintiff's damage, should you find for the plaintiff, is the difference between what the said stock was actually worth at the time of the said purchase and the amount of money so paid by the plaintiff for the said stock."

The instruction was not a correct statement of the law as applied to any issue formed by the pleadings. If it was intended to apply to an action for breach of warranty, it is not correct. *Huston v. Plato,* 3 Colo., 402. If intended to apply to an action to rescind a contract, it is equally faulty. Section 656, volume 3, Sutherland on Damages, 3rd ed.; *Westerfield v. N. Y. L. Ins. Co.,* 129 Cal., 68, 61 Pac., 667. If intended to apply to an action based upon fraudulent representations, it is objectionable as not clearly stating the rule as announced by our Supreme Court. *Lilley et al. v. Randall,* 3 Colo., 298; *Herfort v. Cramer,* 7 Colo., 483, 4 Pac., 896. Moreover, as no bill of exceptions is incorporated in the record, we are not advised as to the kind or character of evidence adduced at the trial, nor upon what theory the respective parties tried the case. We may well reiterate the language of Judge Walling in *Price v. Kit Carson County,* 22 Colo. App., 315, 124 Pac., 353, viz.:

"We are bound to assume that the evidence supported the court's findings and judgment, provided that the judg-

ment was authorized by the allegations of the complaint, under any conditions of proof."

The issues formed by the pleadings clearly warranted the introduction of evidence which would support the judgment rendered. The failure by the trial court to give the instruction as presented would not justify a reversal of the judgment on that ground alone, unless it should appear from the record that defendant's substantial rights were invaded by such refusal, or he was prejudiced thereby. No such showing is disclosed by the record. In the absence of any testimony or evidence, it is impossible for us to conclude whether or not plaintiff in error was in any way prejudiced by the refusal to give the instruction. For anything that appears in the record to the contrary, such proceedings, stipulations or admissions, may have occurred at the trial as to render it entirely unnecessary for such instruction to be given by the court.

In *Nelson v. Nelson et al.*, 146 Pac. (Colo. App.), 1079, the court, speaking through Judge King, said in part:

"It is not sufficient to show that error in the abstract was committed in giving an instruction, but it must affirmatively appear that it was prejudicial, and, as a general rule, this can only be determined by a consideration of the evidence."

In *Rice v. Williams*, 18 Colo. App., 330, 71 Pac., 433, error was assigned upon the giving of instructions numbered one to nine inclusive. No. 1 was not set out in the abstract. The court said, in part:

"To enable us to judge whether the jury could have been misled we must know not only what was the first instruction, but also what the evidence was. For aught that appears, there was no conflict in the testimony. Without an opportunity to examine it, it is impossible for us to know whether there was or not. It may have been so conclusive as to preclude any verdict but the one which was returned; and if so, the language of the instructions

is not very material."

See *Sutton v. Dana*, 15 Colo., 98, 25 Pac., 90, and *Argentine Mining Co. v. Terrible Mining Co.*, 122 U. S., 478, 30 L. Ed., 1140, 7 Sup. Ct., 1356.

We are satisfied that the record fails to disclose reversible error in any of the rulings or proceedings of the trial court. The judgment will therefore be affirmed.

Judgment affirmed.

[No. 4077.]

LAUER v. KAUFMAN.

APPEAL AND ERROR—*Finding on Sufficient Evidence*, against which there is nothing conclusive in the record, is decisive in the court of review.

Error to Rio Grande District Court. HON. CHAS. C. HOLBROOK, Judge.

Mr. JESSE STEPHENSON, for plaintiff in error.

Messrs. CORLETT & CORLETT, for defendant in error.

MORGAN, J.

Action was commenced by Mr. Lauer, March 30, 1913, in the lower court, for contribution in the amount of one-third of what he had been compelled to pay on some promissory notes signed by him and the defendant Kaufman, on a two-thirds and one-third liability, respectively. Defendant admitted his liability to the plaintiff in the amount sued for, but pleaded, by way of counter-claim, that plaintiff was indebted to him in a much larger sum, on account of certain transactions, or joint dealings, in lands. The issues, there-

fore, came on upon the contentions of the parties in reference to a settlement of such transactions. The lower court, sitting without a jury, found that plaintiff owed the defendant $2,000 on a just settlement of their land transactions, and that defendant owed the plaintiff $555.43 on the notes; and, on such finding, entered judgment against the plaintiff for the difference, $1,444.57, and apportioned the costs equally between them. Plaintiff sued out the writ of error.

The plaintiff and defendant, owning some lands in Colorado (the plaintiff an undivided two-thirds and the defendant an undivided one-third interest therein), traded the same for some lands and other property in Kansas. The notes upon which the suit is based were given in payment to some real estate agents for commissions, the plaintiff being liable for two-thirds and the defendant for one-third thereof, and about which there was no dispute. The defendant refused to pay his part of these notes because of a dispute over a settlement and division of the proceeds of the property which they traded for, which consisted of cash and securities, and two sections of land, in different counties, and one piece of town property; the conveyances of the land being made, whereby one section and the town property were conveyed to the plaintiff, and the other section to the defendant. Both admitted that the town property was conveyed to the plaintiff to hold for the use of both of them, on the one-third and the two-thirds basis, and the dispute arose as to the purpose and intention in conveying the two sections, one to each of them respectively. The plaintiff claims that they agreed to take one section, each, and hold the same in absolute ownership, and that each section was so received and taken by each of them as a credit upon, or partial distribution of, their joint interests, at a valuation of $12,800, to each of them; and, in all of the plaintiff's statements of account, upon which some settlements had been made between them, these which charged the defendant with having received instructions

his interest in the proceeds of their joint property, the sum of $12,800 (the trade value of the section conveyed to him), and charged himself with the same amount for the section he had taken. Both admitted that the two sections of land were taken, in the trade, upon an inflated value, much greater than the actual value thereof. It may be seen that a loss would be sustained in so taking and accepting these two sections at a valuation of $12,800, which loss would be the difference between the actual and the trade value. The defendant contends that the two sections were so conveyed for convenience only, and that each of them held the same upon the one and the two thirds basis; and objected to being charged with having received $12,800, by way of the section of land so conveyed to him, because he would thus lose one-half, instead of one-third, of the difference between the trade value and the actual value thereof.

The settlements made between the parties, prior to the suit, were made upon a long itemized statement, made out by the plaintiff, which was presented at the trial, and agreed upon, except a charge against the defendant of of $12,800, on account of the section of land so conveyed to him. This item was disputed by the defendant, for the reason heretofore stated.

The lower court took defendant's view of the dispute, and found that the two sections were conveyed to the parties, separately, for convenience, only; that the actual value was just one-half of the trade value; that they were conveyed and held for the joint use of both, according to the one and the two thirds interest; and that the plaintiff should sustain two-thirds of the loss and the defendant one-third thereof. There is no conclusive evidence against these findings, and as these were the only issues in the case, the findings thereupon are decisive of the controversy. [redacted]wer court, in rendering the judgment, permitted each indebted [redacted]retain the sections so conveyed at a valuation of transactions, the trade value, and thereby, necessarily, found

that the amount charged in the settlement against the defendant of $12,800, as having been received by him, was erroneous. The court then adjusted the settlement, as heretofore stated, by finding that the plaintiff owed defendant an estimated amount of $2,000, by reason of the incorrect charge, and then deducted from this the $555.43 which defendant admitted he owed plaintiff on the notes, and gave defendant judgment for the difference of $1,444.57.

The only error counsel for plaintiff contends that the lower court made (aside from the finding that the title was taken, individually, for convenience, only) is that the court erred in not finding the actual value of both these sections before adjusting the loss between the parties, claiming that the evidence shows that the section defendant obtained was of greater value than the other. There is no evidence that one section was of any greater value than the other except a statement claimed to have been made by the defendant, at the time the two sections were convyed, that he received the better one of the two. However, the plaintiff testified that he and the defendant valued the two sections at about one-half of the amount at which they were taken in the trade. The defendant testified that the two sections were both of the same value. Two other witnesses testified that the valuation of the two sections was about $10 an acre (which was one-half of the trade value), but neither of them testified that one was of any greater value than the other. The lower court was therefore justified in finding that both sections were, practically, of the same value, and in estimating the actual value thereof at one-half of the trade value. It appears, therefore, that the claim of the plaintiff that the defendant received $12,800 by taking his section is not justified; the defendant would be mulcted in a loss of the difference between one-half and one-third of the loss incurred, by reason of being charged with the full trade value, which was twice the actual value of the land. The total loss to both was $12,800,

and defendant's loss should be only one-third of this sum, or $4,266\frac{2}{3}$, while plaintiff's charge against him made him lose $6,400, or a loss of over $2,000 more than he should lose; and as there was no dispute over the other items in the plaintiff's statement of the account between him and the defendant, the court allowed the defendant judgment against the plaintiff for such $2,000, and after deducting the amount owing by the defendant to the plaintiff on the notes entered judgment in defendant's favor for the balance. This was a fair and reasonable conclusion, and being based upon the evidence, it must be sustained.

Judgment affirmed.

[No. 4181.]

UNITED COMMERCIAL TRAVELERS OF AMERICA V. BOAZ.

1. LIFE INSURANCE—*Construction of Policy.* A policy of life insurance is construed by the same rules as other contracts. (435, 436.)

2. —— *Notice of Death or Accident.* A provision of the policy that in case of an accidental injury to the assured, notice must be given within a specified time, to a designated officer of the insured, and that the failure to give the notice "shall be deemed a waiver of all claims" against the insured, is a lawful condition. A failure to give the notice, no excuse being shown, defeats an action upon the policy, even though the failure is the result of accident, or negligence not involving any element of bad faith, and no prejudice to the insurer by the failure to give the notice is shown.

The husband of plaintiff was a member of the defendant, a fraternal order maintained solely for the benefit of its members and their beneficiaries. The constitution of the order provided that in the event of an accidental injury for which a death claim might accrue against the order, "notice of the accident must be given in writing to the Supreme Secretary, within ten days after the accident." The husband died from the effect of a dose of arsenic, taken by accident, as plaintiff alleged, on the same day with his death. Eight days after the accident plaintiff's attorney mailed a notice thereof, and of the death, to the Supreme Secretary at Chicago, Illinois. The office of the Supreme Secretary was maintained in Columbus, Ohio, and the plaintiff knew this, or had the means of knowledge. The

notice was not received by the Secretary until the 19th day after the accident. No excuse for the misdirection of the notice, or for the failure to mail it at an earlier day, was pleaded or proven. No prejudice to the order from this delay appeared, nor was bad faith on the part of the plaintiff suggested. The defendant pleaded the failure to give the notice, and that the death was not accidental. *Held* there could be no recovery. (425-432.)

3. —— *Immediate Notice,* or the like, construed to mean notice in a reasonable time, in view of all the circumstances, and ordinarily a question for the jury. (428, 429.)

4. —— *Excuses for the Omission to Give the Required Notice* must be pleaded and proved by one claiming under the policy. (432-434.)

5. —— *Waiver of Conditions by the Insurer.* The insurer relying upon the failure to give a notice required by the policy may at the same time plead other defenses. The inter-position of an additional defense is no waiver of the absence of notice. Neither is the retention, without objection, of a notice not received in due time; nor the sending, at request of the beneficiary, of customary blanks for the proof of death, after receipt of the notice, not in time, the insurer expressly reserving all rights. (440-443.)

Error to Denver District Court. HON. GEORGE W. ALLEN, Judge.

MR. ARCHIBALD A. LEE, for plaintiff in error.

Mr. CHARLES A. MURRAY, for defendant in error.

Opinion by CUNNINGHAM, P. J.

Defendant in error brought her action in the District Court on a contract of insurance entered into between her husband and plaintiff in error, in which contract plaintiff was named as beneficiary. On March 26th, 1913, plaintiff's husband, the assured, died from the effects of a dose of arsenic, which he took on that day. Plaintiff contends that the arsenic was taken by mistake, while defendant insists that the evidence shows it was taken with suicidal intent. In the view we take of another feature of the case, presently to be alluded to, it will not be necessary for us to determine assured's motive in taking the poison which destroyed his

life. or convenience we shall assume that the arsenic was taken by mistake, and shall refer to the transaction as an accident. The plaintiff recovered judgment, and the case is here for review on writ of error.

The defendant is a fraternal organization, without capital stock, and is maintained solely for the benefit of its members and their beneficiaries. In his application for membership, which was filled out by himself, assured stipulated and agreed to accept his certificate of membership subject to all the conditions, provisions and limitations of the constitution, laws, rules and regulations of the Order as they then existed or might thereafter be amended. He also stated, in his application, that he had acquainted himself with the constitution and rules of the Order. Indeed, the certificate of membership, which is little more than a brief card introducing Boaz to the other members of the Order, does not specify the rights or obligations of either party to the contract. On this point the membership certificate states that William Boaz (plaintiff's husband) "is entitled to all the rights and privileges of membership accruing to him *under the constitution.*" Among other things, the Constitution of the Order, in force at the date of assured's death, contained the following provisions:

"In event of any accidental injury on account of which a liability may arise against the Order, notice of the accident (not the results) must be sent in writing to the Supreme Secretary within ten days after the accident, stating the full name and address of the injured member, the nature date, extent and full particulars of his accident and injury, and the name and address of his medical attendant.

"In event of a death resulting from external, violent and accidental means, as hereinbefore provided, notice of the accident must be given as hereinbefore provided, and, in addition, notice of the death must be given in writing to the Supreme Secretary within ten days after the death. * * * Failure to give any notice, together with full par-

ticulars, as hereinbefore required, shall be deemed a waiver of all claims against the Order, and shall invalidate the same. * * *. The forwarding of blanks by the Supreme Secretary, as above provided, or the investigation of any claim by a member of the Order, or anyone authorized to represent the Order, or the holding of an autopsy by any one representing the Order, shall not constitute or be a waiver of any right or of any defense which the Order may have against any claim made against it, but all labor, inconvenience and expense which a claimant, under the provisions of Section 5 of this Article, may, in any case, incur in making proof of any claim, shall be at such claimant's risk."

It will be observed from the foregoing provisions of the constitution that plaintiff was required to give the Order notice of any accident upon which she might seek to predicate liability, within ten days from the date thereof. (It will be further noted that two notices were required by the constitution, but since the death occurred on the same day that the accident happened, and since neither party has, in his brief, made any point of the provision requiring two notices, we shall not do so.) The contract further expressly provides that failure to give notice within the time stipulated "shall be deemed a waiver of all claims against the Order and shall invalidate the same." As we proceed, the importance of this forfeiture provision will become apparent.

On April 3rd—eight days after the accident and eight days after the death of her husband—plaintiff's attorney prepared a written notice of the accident and death, which he addressed to "Mr. Chas. C. Daniel, Supreme Secretary, Order of United Commercial Travelers of America, Chicago, Illinois." This notice was enclosed in an envelope which was addressed in precisely the same way. The envelope containing said notice appears, from the postmarks thereon, to have been mailed at Denver on April

3rd, and to have reached Chicago on April 4th. The headquarters of the Order were not in Chicago, but in Columbus, Ohio, and the office of the Supreme Secretary was in the latter city. No evidence was offered tending to show that the Order maintained an office in Chicago. After several days' delay in Chicago, the letter was finally forwarded to Columbus (by whom does not appear), and reached that city on Saturday, April 12th, judging from the postmark on the envelope. But the letter was not delivered to the Supreme Secretary or to the Order until Monday, April 14th—nineteen days after the date of the accident, and nine days after the expiration of the time for the serving of the notice under the provisions of the contract.

1. Was the giving of notice within the prescribed time a condition precedent to plaintiff's right to recover? This is the first question in the case, and this question has been repeatedly answered in the affirmative by our Supreme Court. In *Jennings vs. Brotherhood,* 44 Colo., at page 74, 98 Pac., 984, 18 L. A. A. (N. S.) 109, 130 Ann. St., 109, it is said:

"The purpose of the provision of the policy invoked by the defendant and above quoted [the provision referred to requiring a notice of accident to be given within ten days, etc.] was to enable it to verify the statements made by the insured, in order to protect itself from fraud, *and the notice thereby required is a condition precedent to a right of recovery under the policy.*" (Italics here and elsewhere, unless otherwise stated, are our own.)

In *Barclay vs. London Co.,* 46 Colo., 558, 105 Pac., 865, this rule is again announced in the most sweeping terms possible. In the latter case, at page 564 [105 Pac. 867], it is said:

"The plaintiffs voluntarily entered into the contract, with these conditions therein, and thereby made themselves subject to such conditions. Their stipulation in regard to

immediate notice was a condition with which they must comply *in order to bring the defendant under its obligations.* Their right to indemnity flowed from this instrument. *It was an executory contract, and failure to comply with the conditions as to notice was a failure to complete the contract."*

It does not appear from a statement of the facts in the *Barclay* case that the policy there under consideration stipulated forfeiture as a penalty for failure to give the notice within the time specified, as does the policy in the case we are now considering, and Mr. Justice White, who wrote the opinion in the *Barclay* case, quotes the following from *Kentzler vs. Association,* 88 Wis., 589, 60 N. W., 1002, 43 Am. St., 934:

'True, there is no forfeiture clause in the contract. Nevertheless the plaintiff, in order to maintain this action, was bound to perform such condition precedent."

Whether the opinion in *Barclay vs. London Co., supra,* was meant to modify the announcement in *Preferred Acc. Ins. Co. vs. Fielding,* 35 Colo., 119, 83 Pac., 1013, 9 Ann. Cas., 916, we need not determine. In the latter case, which has been cited by plaintiff, it was ruled that a notice given ninety days after the accident, where the policy required "immediate notice," did not bar the beneficiary's right to recover upon a policy which did not, *in express terms, or by necessary implication, provide for forfeiture for default with respect to the giving of notice.*

It is important to keep in mind the distinction between the policy under consideration in *Preferred Acc. Ins. Co. vs. Fielding, supra,* and the policy, or contract, we are here considering. In the former case the specific time for giving the notice was not fixed or stipulated, but "immediate notice" was there provided for. The courts have pretty uniformly ruled that the phrases, "immediate notice," "prompt notice," and other provisions of similar import, do not mean instant notice, but it is held that such phrases

must be construed to mean that the notice shall be given in a reasonable time, and what is a reasonable time depends upon all the circumstances in the case, and ordinarily becomes a question of fact for the jury. It will be observed that there is a further important distinction between the provisions of the policy in the *Fielding* case and the provisions of the contract in the case we are now considering. In the Fielding case, as we have pointed out, forfeiture for default in the giving of the notice was not stipulated, while forfeiture *is* stipulated in the present case. In the *Barclay* case it is further said (page 562, 105 Pac., 866):

"No court should, or can, properly, take from the parties the inherent right to contract as they will, and make a contract for them as *they* might have made, have made, in the light of subsequent events." (The italics appear in the *Barclay* opinion.)

Again, at page 564, in the *Barclay* case (105 Pac., 866), Justice White uses this language:

"The plain and unequivocal requirements of the contract are that 'upon the occurrence of an accident, and also upon receipt of notice of any claim on account of an accident, the assured shall give immediate notice in writing of such accident or claim with the fullest informaiton available,' to the defendant. These conditions are as much a part of the contract as any other portion thereof."

The foregoing announcements by our Supreme Court would be binding upon us even if they were contrary to the weight of authority elsewhere. But they appear to be in entire accord with the vast preponderance of authority in this and other countries. See cases collated in note to *Hatch v. U. S. Casualty Co.*, 14 Ann. Cas., 293. To hold that the giving of notice within the time the parties to a contract of insurance have voluntarily agreed upon (when said parties have further stipulated that all claims under the policy shall be deemed waived for failure to give the notice within such time) is not a condition precedent, is

to hold that it is not a condition at all. A judicial construction of the contract here under consideration having this effect would be in the very teeth of the opinion in Barclay vs. London Co., *supra,* and the authorities there cited and relied upon.

What plaintiff's rights would have been had she proved that from physicial or mental infirmity existing from the date of the accident to the expiration of the time for the giving of the notice, or even existing immediately before and at the expiration of the time for the giving of the notice; or had she shown that she had no knowledge of her husband's connection with the Order, or her right to indemnity by reason thereof, in time to comply with the conditions requiring notice; or had her contract provided for "immediate notice," or "prompt notice"; or had it contained no provision for forfeiture for failure to give notice within the time provided; or had plaintiff mailed the notice in an envelope properly addressed, in ample time, and had the same not been delivered to the Supreme Secretary by reason of some unforeseen catastrophe or mishap, over which the plaintiff had no control, we are not called upon to determine, since no such state of facts is shown by the record to exist in this case.

2. It is true, as plaintiff contends, that under certain circumstances one claiming under a contract of insurance, the provisions of which are in all respects similar to those in the contract we are now considering, may recover, notwithstanding the notice has not been given within the stipulated period. There is a line of authorities holding that one charged with the duty of giving notice of an accident, or of death, may plead and prove, as an excuse for his failure in that behalf, that it was, through no fault of his own, impossible for him to comply with the provision touching the giving of notice. This rule appears to have been adopted and followed by our former Court of Appeals in *U. S. Casualty Co. v. Hanson,* 20 C. A., 393, and in

Jennings vs. Brotherhood, *supra;* but there was neither plea nor proof in the instant case to bring plaintiff within this rule. For failure to comply with the provision of the contract requiring the service of notice was due to the misdirection of the envelope containing the notice. Furthermore, there is no sufficient reason disclosed by the evidence for her failure to mail the notice several days earlier than it was actually mailed. No evidence whatever was offered to explain the apparent carelessness in addressing the envelope containing the notice to Chicago instead of Columbus. There is an intimation in her brief that she had no knowledge or means of knowledge as to the proper address of the Supreme Secretary, to whom the notice was, under the contract, to be sent, and to whom, in fact, she attempted to send it, but a statement in her brief, it goes without saying, cannot supply or take the place of apt averments, and proper proof necessary to sustain the same. Moreover, as we read the record, it cannot be questioned that plaintiff knew or knew how to ascertain by the slightest effort) the address of the Supreme Secretary of the Order. Her husband's membership certificate showed plianly that the Order had a local secretary (or there was a local lodge of the Order which had a secretary) in the City of Denver, where the accident occurred, and where, ever since the issuance of the certificate in 1906—more than seven years —plaintiff and her husband had resided. A letter dated April 11th, written to the Order on plaintiff's behalf, states that counsel for plaintiff, or plaintiff herself, or both of them (the plural pronoun being used) had ever since the death of the assured been in conference with the local secretary referred to. It is also clear that plaintiff knew of her husband's connection with the Order, for she testified that she sometimes paid his dues and received the receipts therefor. These receipts, which she offered in evidence, show that they were issued in Denver, by the scretary of the local lodge, with whom, the letter of April 11th states,

plaintiff or her counsel had been in conference "ever since his death"—meaning the death of plaintiff's husband. This local secretary had, at the time of Boaz' death, and for a long time prior thereto, maintained an office in one of the largest and best known office buildings in Denver. There is additional evidence, not necessary to be recited here, which conclusively established plaintiff's knowledge, or ready means of knowledge, as to the address of the Supreme Secretary. It is not contended she had any information pointing to Chicago as the city to which the notice should be sent.

Counsel for plaintiff says in the brief:

"It is not claimed that either Mrs. Boaz or her attorney had ever seen the constitution or by-laws or had anything whatever to guide them other than the said certificate and cards"—meaning by "cards," receipts for dues paid by plaintiff herself in part.

Granting, but not so deciding, that ignorance of the provisions of the constitution would, if alleged and proven, have excused plaintiff's failure to give timely notice, there are several conclusive answers to the suggestion quoted from her brief.

1. She tendered no such issue and offered no proof to support an issue of that character, had one been tendered.

2. As already pointed out, she, at least, had the ready means of the knowledge which she, in her brief, insinuates she did not possess.

3. The burden was not upon the Order to prove plaintiff's knowledge of what, at least *prima facie*, she is presumed to know. A plaintiff may claim no advantage by attempting to shift a burden which the law clearly imposes upon him to the shoulders of his adversary.

That the directing of the notice to Chicago, instead of Columbus, accounts for the plaintiff's failure to get it into the hands of the Order within the time prescribed, cannot, under the record, be doubted. The misdirection of the notice

was due entirely to plaintiff or to her own agent. For such unexplained error defendant cannot be held responsible, nor can plaintiff be relieved from same. The contract required her to give notice to the Supreme Secretary. Mailing that notice, or otherwise conveying it was, under the contract, the business of plaintiff. She was at liberty to select whatever agency of communication she preferred, but it was her duty to get the notice into the hands of the Supreme Secretary within the time prescribed in the contract, unless to do so became impossible for reasons beyond the control of plaintiff.

Plaintiff had in her possession a card mailed by defendant to her husband at her residence address. This card was mailed at Columbus on the day preceding the accident, the same being enclosed in an envelope plainly indicating that it had been deposited in the mails at Columbus. On this envelope, in bold type, was the word "IMPORTANT," the letters used to form this word being very much larger than any other letters appearing on the envelope. The card contained ,at the top thereof, in large, red letters, a warning that notice of accident must be given *in ten days* to Chas. C. Daniel, Supreme Secretary, and that *forfeiture of all claims against the Order was the penalty for failure to comply with this warning.* The first two words in this red-letter notice, or warning, were: "Don't Forget," the letters forming these two words being much larger than the balance of the sentence giving the warning. It is not entirely clear from plaintiff's testimony when this card reached her, but it was post-marked, as we have said, at Columbus, on March 25th, the day preceding her husband's death. She admitted that it probably came in due course, hence must have been in her possession in ample time for her to have acted upon the warning which it contained, especially if she had resorted to the telegraph in sending the notice, as she might well have done. The character of the card, and the envelope containing the same, indicate an

honest desire on the part of the organization to warn its members against negligence which might work a forfeiture of their claims for indemnity, and negatives any purpose on its part to unjustly escape responsibility. This card containing the warning as to notice appears to be a stock card, designed and used, in addition to the warning we have mentioned, to call the attention of members of the Order to assessments, and when the time for paying same would expire.

From the foregoing it is apparent that plaintiff has failed to establish an excuse recognized by law for the failure on her part to comply with the terms of the contract which she seeks to enforce against the Order. The following cases are in point: *Railway Passenger Assur. Co. vs. Burwell,* 44 Ind., 460; *Sherwood, Admr. vs. Agric. Ins. Co.,* 10 Hun., 593 (17 N. Y., S. C., 593) ;*United Benev. Soc. vs. Freeman,* 111 Ga., 355, 36 S. E., 764; *Central City Ins. Co. vs. Oates,* 86 Ala., 570, 6 So., 83, 11 Am. St., 67; *Maddox vs. Ins. Co.,* 56 Mo. App., 343.

3. It is urged, on behalf of plaintiff, that defendant makes no claim that she did not act in good faith in the matter of giving notice. Here, again, it is sought to place a burden which rightly belong to plaintiff upon the defendant. Having alleged and proved plaintiff's failure to comply with the conditions of the contract with reference to giving notice, defendant is not required to go further and prove that her failure was the result of bad faith. Neither is defendant required, as plaintiff intimates, to prove that her breach of an important provision of the contract resulted in injury to it. Nor can we agree with plaintiff's statement that the record shows, affirmatively, that the defendant's rights were not prejudiced by the delay in the giving of notice.

There is evidence in the record indicating a very radical change in the attitude of certain important witnesses toward defendant. Their testimony on the trial by no means harmonizes with their written statements made shortly follow-

ing the death of assured, and there was evidence tending to show that the bottle containing the arsenic, and the bottle containing the harmless drug which plaintiff contends her husband intended to take, had disappeared or had been destroyed following assured's death.

These are unpleasant features of this case which we do not care to discuss at length, but plaintiff's insistence that an investigation could have been made in every respect as satisfactorily after April 14th as before, justifies the brief comments we have here made.

It is true, as plaintiff says, that defendant made no attempt to conduct an investigation after the receipt of the belated notice, but had it done so there are numerous authorities holding that it would thereby have waived the defense of no notice.

4. It might appear from a few opinions that have been handed down by courts in this country that there exists an impression in certain quarters that a contract of insurance must always be interpreted as a unilateral agreement, but, nevertheless, enforcible in all strictness against the insurer; that as to the insured and his obligations thereunder, such contracts are not to be taken seriously, if, by so doing, a forfeiture may result. In other words, a view that a contract of insurance is *sui generis* appears to have gained a foothold in this country.

This theory finds no support in reason and is against the overwhelming weight of authority. The decisions which seem to uphold this theory and which were, doubtless, designed to protect the interest of the insured, have had quite a contrary effect. They have led insurance companies and fraternal organizations, in self-defense, to incorporate in their policies and contracts of insurance restrictive provisions that, in the earlier days, were unknown, or, at least, not common to such contracts.

"A contract of insurance being, then, in essence merely a contract to pay on the happening of a certain condition,

the natural inference is, that this contract should be governed by the rules applicable to contracts generally. But the courts have frequently fallen into the error of regarding a contract of insurance as a contract *sui generis*, so to speak, scarcely governed by the most familiar rules applied to contracts generally. But it is now generally accepted that a contract of insurance is to be governed by *the same principles* applicable generally to agreements involving pecuniary obligation." Cooke on Life Ins., sec. 3.

It is quite true that, under certain circumstances, certain provisions in life insurance contracts are to be liberally construed, but, under certain conditions, this rule of interpretation applies to most contracts.

"Policies of insurance are presumed to contain the complete engagements of both insurer and insured in regard to the subject matter embraced in them. They, like all other contracts, must be construed according to the intention of the parties as manifested by the words used and according to their ordinary signification. * * * Courts cannot make contracts for parties; or render a party liable on a different basis from that upon which his liability was stipulated. It is the duty of the court in all cases where the question is simply the determination of the meaning of a written document, to declare its legal interpretation, and it is error to leave its construction to a jury." Kerr on Insurance, pages 129 and 130.

"Where there is no ground for reforming the contract, the construction of this, (meaning the contract of insurance) as of all other written instruments, depends not upon the presumed intention of the parties, but upon what is the meaning of the words which they have used." Bunyon—Law of Fire Ins., page 72.

"Contracts of insurance have no particular sanctity over other kinds of agreements, and the same rules of interpretation apply to all alike." Bacon-Benefit. Soc. & Life Ins. (3rd Ed.), sec. 177.

May on Insurance (4th Ed.), at sec. 3, after considering the illogical attitude of certain writers on life insurance contracts, reaches the conclusion that they are contracts "governed by the same principles which govern other contracts."

"The provisions of a life insurance policy are construed and applied like the terms of any other contract." Niblack—Benefit Soc. & Acc. Ins. (2nd Ed.), sec. 143.

"Policies of insurance are subject to the rules of construction which are applicable to other contracts." Joyce on Insurance, secs. 208 and 209.

"Mutual benefit societies, or fraternal organizations, are in effect policies of life insurance and in most respects are governed by the same rules which prevail in policies of insurance." Niblack—Benefit Soc. & Acc. Ins., sec. 143 (2nd Ed.); Bacon—Benefit Soc. & Life Ins. (3rd Ed.), sec. 180; Joyce on Ins., sec. 207.

5. Plaintiff further contends that defendant has waived its rights to defend upon the ground that the notice was not given in time. She bases her contention upon the following grounds: 1. That defendant has set up in its answer other defenses than the default in the giving of notice. 2. That it retained the notice after receiving the same, without complaint, or without notice that the same had arrived too late. 3. That after the notice was received defendant sent the customary blanks for proof of death and further particulars concerning the accident to plantiff.

We shall presently consider these various grounds upon which waiver is predicted, in the order stated, but before doing so it is well to have before us a definition of the term waiver. In *Central City Ins. Co. v. Oates, supra,* the Alabama Supreme Court at page 570 [6 So., 85, 11 Am. St., 67], thus defines the term:

"Waiver is necessarily a matter of mutual intention between contracting parties, in the nature of a new contract between them."

Bowers, in his late work on the "Law of Waiver," page 19, says:

"Waiver is the voluntary abandonment or surrender, by a capable person, of a right known to him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefit."

For further definitions of waiver see "Words & Phrases," Vol. 8 (1st series), page 7375, 7376 and 7379; also 2nd series of same work, Vol. 4, page 1222, *et seq.*

The first contention upon which waiver is based, namely, that the Order by defending on the ground of suicide was thereby precluded from including in its answer the defense of the failure to give notice within the time provided by the contract, cannot be sustained. Under our Code, Sec. 65, "the defendant may set forth by answer as many defenses and counter claims as he may have," and notwithstanding the views expressed by the writer of this opinion in the case of *Daniel vs. Stock,* 21 Col. Ap., 651, 126 Pac., 281, it is probably the impression of the bench and bar of this state generally that, under the decisions of our Supreme Court, a defendant may plead inconsistent defenses; but whether this be so or not we need not now pause to consider, since the defense of suicide and the defense of failure to give notice, both of which were set up by the defendant in its answer in this case, are not inconsistent defenses in any sense of the word. We know of no precedent for withholding from an insurance company the benefits of the provisions of our Code quoted above.

"When the defendant was called into court to answer the suit it answered and said (or attempted to say), that the death was from a cause not covered by the policy, and besides, no notice of the death was given as required by the contract. Appellant asks us now to say that answer means that the defendant waives the notice. No greater violence could be done to the letter and spirit of the answer than to

give it that meaning. No case cited by appellant would justify such an interpretation."

Dezell vs. Fid. & Cas. Co., 176 Mo., at page 267, 75 S. W., 1102. The Dezell case is an extremely interesting one because of the very thorough consideration given to the question of waiver, and the array of authorities cited by counsel in their briefs, which are printed in connection with the opinion. Judge Valliant, who wrote the majority opinion, at page 265 of the State Report (75 S. W., 1113), cited, says:

"Appellant's proposition is that defendant, by the act of denying in its answer that the policy covered the loss, waived the defense of want of notice, notwithstanding that defense was expressly pleaded also. Some of the cases cited by the learned counsel appellant lead in that direction, but none of them go to that extent."

At page 267 (75 S. W., 1114), Judge Valliant says:

"There is no necessity for looking into the cases which hold that when an insurance company informs the holder of a policy, *before the period prescribed for making the proof of loss has expired,* that it has resolved not to pay the insurance, the policy holder is excused from the duty of furnishing such proofs to the company."

Nor need we examine such cases, for the one here under consideration does not properly belong to that classification. Speaking for the majority of the court, Judge Valliant sums up, after a most learned analysis of the strongest authorities cited by appellant, thus:

"After a careful study of those cases we are convinced that it was not the intention of the courts to say more than that if the insurance company, *before the time for furnishing proof of loss expired,* denied its liability and let the policy holder know that it had resolved not to pay the claim, the latter was excused from offering the proofs."

The Missouri Court then quotes with approval the following from *Armstrong vs. Insurance Co.*, 130 N. Y., 560, at 567 (29 N. E., 993):

"It needs no argument to show that it (the insurance company), was justified in standing upon its legal rights and asserting them in the ordinary way and at the proper time, so long as in doing so it did not mislead the plaintiff to his own harm. It had the right to base its defense to any claim made upon it upon the violation prior to the fire of any provision of the contract, and to require the performance by the assured after the fire of those conditions which he had contracted to perform and which were essential to his cause of action and preliminary to the assertion of any claim upon the policy. And in demanding strict compliance with such condition it did not waive any of its rights under the contract."

Moreover, the plaintiff filed no motion requiring the defendant to elect upon which defense it would rely, and even if it be conceded that the defendant could not rely upon both defenses, we are aware of no rule which permits the plaintiff, after the trial, to make the election as to defenses for the defendant.

Smith vs. Am. Nat. Ins. Co., 111 Ark., 32, 162 S. W., 772; *Aetna Co. vs. Fitzgerald*, 165 Ind., 317, 75 N. E., 262; 1 L. R. A. (N. S.), 442, 112 Am. St. Rep. 232, 6 Ann. Cas., 551; *Insurance Co. vs. School Dist.*, 66 Kans., 77, 71 Pac., 272.

In the Arkansas case cited above it is said that:

"The mere assertion of a defense in addition to that of the failure to give notice does not deprive the insurer of that defense, if the assured is invited to incur no expense or trouble, and nothing is done which influences the beneficiary to fail in the performance of that duty."

It is clear from the record in this case that the Order did not invite plaintiff to incur any expense or trouble, and it did nothing to influence her to fail in the performance of

her duty with respect to the notice. All doubt on this score is removed by a letter mailed to the defendant and dated July 25th, wherein counsel for plaintiff uses this language:

"As you have thus far given no indication of any intention to settle this claim, *but on the other hand have all the time insisted that you would admit no responsibility* * * * the beneficiary has directed us to take the necessary proceedings to enforce the collection of the claim, if possible."

From this it will be seen that the defendant's attitude from the beginning was such that the plaintiff fully understood that it admitted no responsibility.

In *Aetna Co. vs. Fitzgerald, supra,* the Indiana court used the following language:

"We cannot sanction the view that, after the assured has sinned away all right of recovery under the policy, he may yet recover, by proof that the company refused to pay on the ground that the policy did not cover the claim asserted in the notice. The refusel to pay on a wholly different ground, *made within the time that the policy holder may take steps to make good his right under the contract,* is treated in this state as a waiver *per se;* but we perceive no reason, *after the right is gone,* for permitting the policy holder to go to the jury on the question of waiver under proof of the solitary fact that the company had afterwards declined for another reason to recognize the validity of the policy."

See also cases cited by the Indiana court in the *Aetna* case.

Neither will the plaintiff be heard to complain that the defendant retained the notice without calling her attention to the fact that it had been received too late. The silence of the defendant was not as to a defective notice, which it was possible for the plaintiff to cure had her attention been called thereto, for as was said in *St. Louis Co. v. Kyle,* 11 Mo., 278, 49 Am. Dec. 74:

"Whether the company is silent or gives objection cannot alter the right of the parties. If the notice is too late,

it is the end of the matter. * * * Of what avail to the assured to be told that the notice is insufficient? That it was too late? How could the silence of the insurance company be construed that the notice was in time? It was not the duty of the insurance company to make any objection to the want of notice. It was made the duty of the assured to give the notice, and neither silence on the part of the company nor positive objections could alter its character or insufficiency."

In *Insurance Co. v. Lumber Co.*, 10 Col. Ap., at 236, 51 Pac., 178, referring to the question of waiver, it is said:

"It is equally true that an intention may not be presumed from the mere possession of knowledge. There must be some evidence in the case tending to show an intention on the part of the agent who has it."

In *Knickerbocker Ins. Co. v. Gould*, 80 Ill., 388, the Illinois Supreme Court, referring to the contention that the company waives a notice received too late by interposing no objection to the same, thus disposes of it:

"If the company makes objection, the insured cannot remedy the defect. It is too late, and hence there is neither reason nor necessity for the compnay to speak or be concluded by its silence."

To the same effect are the following: *Connell v. Milwaukee Co.*, 18 Wis. 387; *Travelers Ins. Co. v. Nax*, 142 Fed. 567, 73 C. C. A., 649; *Johnson v. Md. Cas. Co.*, 73 N. H. 259, 60 Atl., 1009, 111 Am. St. Rep., 609; *Smith v. Haverhill Mut. Co.*, 1 Allen, 297, 79 Am. Dec. 733; *Trask v. State F. & M. Co.*, 29 Pa. St., 198, 72 Am. Dec., 622; Bowers Law of Waiver, secs. 323, 328 and 333; Joyce on Insurance, sec. 3367.

Plaintiff's third ground for contending that the notice was waived, namely, that after it was received defendant sent blanks for proof, etc., is equally unavailing. All blanks thus forwarded by the Order had stamped upon them the following, or a similar statement:

"In sending this blank this Order does not waive any provision of the constitution, but expressly reserves the same."

Furthermore, all blanks were sent only upon the request of the plaintiff. At no time did the defendant call upon plaintiff for proof of any sort, nor did it induce her to spend time or money in the preparation of her case. Moreover, it will be seen from the quotation already made from defendant's constitution, it is expressly provided therein that the forwarding of blanks shall not work a waiver of any defense which the Order may have. That plaintiff fully understood defendant's attitude in this respect is made apparent by the letter of July 25th, written by her attorney, to which we have already referred, and from which we have quoted. We are forced by the record in this case to agree with the statement made by plaintiff's counsel in this letter to the effect that defendant had at no time given any indication of an intention to settle plaintiff's claim, but, on the other hand, it had *at all times* insisted that it would admit *no responsibility.*

The conduct of the defendant in at all times persistently refusing to admit liability, does not satisfy the definition of waiver, or afford a ground upon which waiver may be predicated.

Plaintiff having failed to serve notice within the time required by the contract, and thus having violated an important provision of the very contract upon which she is relying, and her proof not bringing her within any exception to the rule requiring the service of notice as a condition precedent; and the defendant not having waived any of the conditions of the contract, the judgment of the trial court must be reversed.

Reversed.

BELL, J., concurring.

KING, J., specially concurring.

HURLBERT & MORGAN, J., J., dissenting.

KING, J., specially concurring.

I recognize no distinction, that affects the principle of waiver, between the several defenses pleaded in this case and the defenses pleaded in *Insurance Company v. Allis Company*, 11 Colo. App., 264, 53 Pac., 242, upon which that court held that the pleading of a defense to an action on a policy of insurance which places the defense on the ground that when the loss occurred the policy was not in force, was in itself a waiver of the condition requiring proof of the loss. The rule applies with equal force to a failure to give the requisite notice of death. But my judgment does not approve that ruling. It seems to me in direct conflict with the Code provision that a defendant may set forth by answer any defense that he may have. If he may plead different defenses, even though inconsistent, he may likewise rely on them, at least to the extent that the mere pleading of one of such defenses shall not be held to waive the right to rely on the others.

MORGAN, J., dissenting.

The conclusion of a majority of my associates does not satisfy me as being just between the parties to this contract of insurance, measuring up to what is right between them; and if it is not right, it is not just. It enforces a forfeiture of all rights of the widow, because she did not get the notice of the death to the proper officer of the order within the ten days provided by the by-laws, although the notice was mailed in time to have reached him and was delayed by reason of a mistake in the address, and did not reach him until nineteen days after the death; and although no claim is made that the delay was in any way prejudicial to the defendant; and although the plaintiff claimed and

pleaded the defendant waived the delay, and issue was joined thereupon and decided against the defendant. There is ample evidence in the record to support the plea of waiver, for example:

Defendant admits receiving the written notice within nineteen days, and that it did not inform the plaintiff that it was received nine days late, until its attorneys filed its answer, which was five months after it was received; about four months intervened between the date the notice was received and the date when payment was refused; defendant received a letter from plaintiff's attorneys on the day the notice was received, again notifying it of the death, and asking for necessary blanks to make proofs of death, and saying that no response had been received from the first notice, to which it replied, inclosing the blank requested, but saying nothing of the delay in the notice; in about two weeks another letter was received from plaintiff's attorneys, saying they had sent the proof on the blank furnished, and asking for further blanks if further proof was required, and asking for further directions, to which no reply was made; about two weeks later the attorneys wrote another letter, saying they had no response to their last, and asking what the defendant had concluded to do as to paying the claim, to which it replied that it inclosed an additional blank, saying, you may answer the questions thereon, if you wish to do so, "this blank is being sent without waiving any of the Order's rights or defenses under the constitution, all rights are expressly reserved," but saying nothing as to the first notice, nor anything as to what right under its constitution was not waived; all of the questions propounded in the blank sent referred to the time and cause of the death, but nothing as to the notice; the blank sent was filled out, and all the questions answered and sworn to, and forwarded to defendant, its receipt was acknowledged by a letter saying, "This is to acknowledge receipt of your communication and inclosure of proof of *alleged accidental* death of William M.

Boaz. We are inclosing a copy of his application as an accommodation only" (italics mine), thus indicating that the death was not accidental; about this time the local executive committee recommended to the supreme council that nothing be paid on the claim, stating that, "after a thorough investigation of the claim," the recommendation was made; about the time the suit was commenced the attorneys for the plaintiff wrote that suit would be commenced, to which the defendant replied, that the Supreme Executive Committee had not disallowed the claim, and that undoubtedly it would be rejected, but saying nothing as to the notice, although the defendant had then had the notice in its hands for over three months, and all the foregoing corespondence had taken place during that time, including the two proofs of death, one of which contained answers to the questions propounded by defendant concerning the cause of death.

The foregoing brief statement of the evidence of waiver, is, to my mind, conclusive that the defendant never intended to make any objection to the delay in the receipt of the notice, nor to interpose the same as a defense, until the answer was filed by its attorneys; all the foregoing taking place before such answer was made.

The answer pleaded five special defenses in addition to the general denial; that the death was caused by having been or being under the influence of intoxicating liquor; that the insured was, at the time of taking the arsenic, and at the time of his death, under the influence of intoxicating liquor; that death was caused by the intentional taking of drugs; that death was caused by suicide; and that notice of the death was not received within the ten days provided in the by-laws. The first absolute, written refusal to pay seems to be contained in this answer, and the first four special defenses are upon other grounds than the delay in the notice; it has been held that such pleas, alone, waive the want of notice, and certainly the delay in receiving it: *Atlantic Ins. Co. v. Manning*, 3 Colo., 224; *Lambkin v. The*

Trav. Ins. Co., 11 Colo. Ap., 249, 52 Pac., 1040; *Helvetia Ins. Co. v. Allis Co., id.; Hartford Fire Ins. Co. v. Hammond,* 41 Colo., 323, 92 Pac., 686.

As to the principle of waiver, it seems to me that it makes no material difference whether the objection to the proofs, or refusal to pay on other grounds, is made before, or after, the time in which the same are to be made; or, whether the defense is that the policy was not in force at the time of the death; it might be different as to the principle of estoppel, but not as to waiver; waiver is wholly a question of intent. This is thoroughly discussed and authorities cited in the case of *Dezell v. Fid. Cas. Co.*, 176 Mo., 253, 75 S. W., 1102, referred to in the majority opinion. Time will not permit further discussion here.

The defenses, pleading other grounds, coupled with the circumstances heretofore related, disclose, not only that the defendant was not relying upon the delay in the notice, but was all along relying on the other defenses pleaded, and so forcibly presented in the evidence. It is true that a defendant may plead all the defenses he may have, but he must take the consequences of such pleading and the effect any defense may have upon any other defense, as a waiver, especially so, when coupled with other acts showing waiver, as in the present case.

Furthermore, the answer and the evidence of the defendant disclose that it made a full investigation of the cause of the death, and that it knew as much as to the facts as the plaintiff did, the principal question being whether such facts showed suicide. The evidence shows the defendant had notice in ample time, and made a full investigation. The supreme auditor testified that his knowledge as to when the notice was received was based entirely upon the rubber stamp impression on it, and that he had no personal recollection as to the matter; one of the members of the local executive committee testified that he knew of the death the day after it occurred; the defendant does not plead nor

prove that it did not know of the death within the ten days, but only that the written notice was not received within that time; no claim is made in the pleading or the proof that the defendant was in any way prejudiced by the delay, or prevented from making all desired investigation and inquiry; therefore the same rule applies as was specifically applied in the case of *Dezell v. Fid. and Cas. Co.*, *supra*, wherein the court said:

"The only purpose of the notice called for by the policy was to put the defendant on the inquiry. But when the defendant comes into court and shows by its answer that it knows as much about the facts as the plaintiff does and agrees with the plaintiff as to the facts, we are bound to conclusively presume that it had notice in due time. This presumption is not as a finding of the fact from the evidence which is the province of the jury, but as a judgment upon the answer which is the province of the court."

The majority opinion contains a learned discussion of the decisions on the subject of notice and the waiver thereof in insurance contracts, and it may satisfy the inquiring mind of attorneys seeking legal relief from the payment of an agreed indemnity, but it does not seem to me to satisfy the mind of those benevolently inclined, nor does it satisfy the origin and purpose of the contract in this instance; this contract of insurance was conceived in philanthropy, born in benevolent fraternity, and intended to carry out a beneficent plan, or design; but it is contested here with a rigidity that is foreign to its environments, and the majority opinion "casts it aside with the rigor of a Lykurgean nurse," simply because the widow, guilty of no neglect on her own part, but through a misdirection of the letter by her attorneys, failed to get the written notice to the proper officer of the order within the time required. Such a forfeiture, so enforced, in the absence of any fraud or imposition, is not in harmony with the contract nor with the present administration of justice, especially among the members of this order, among

whom, by their own purpose and design, justice and benevolence are reconciled and "the judge and the brother are one."

I am authorized to say that Hurlbut, J., concurs in this dissent.

Decided June 14th, A. D. 1915, rehearing denied July 14th, A. D. 1915.

[No. 4186.]

CENTRAL LOCOMOTIVE AND CAR WORKS v. SMITH ET AL.

1. RAILROADS—*Equipment Contract.* Petitioners applied for an order requiring the receivers of a railroad to deliver into their possession two locomotives, sold to the railway company by petitioner's assignor, by contract under secs. 5523-5525 of the Revised Statutes, the title being retained until full payment of the purchase price. The contract complied in all things with the requirements of the statute. The price was $18,100.00, of which $500.00 remained unpaid. All this was admitted by the answer. It did not appear that any labor bills were overdue; that there was any other creditor whose claim was upon an equal footing with that of petitioner's; that the locomotives were necessary to the maintenance of the road, or that, to surrender them, would in any way embarrass the receivers. *Held* that the petitioners were entitled as of right to the order; an order of the District Court denying petitioners' motion for judgment on the pleadings was reversed, and that court directed to enter judgment requiring the receivers to pay the balance due under the contract, or surrender the locomotives. (452, 453.)

2. WRIT OF ERROR—*Where the Writ Lies—Final Judgment.* Petition for an order requiring the receivers of a railroad to surrender certain locomotives sold to the railroad company by a conditional contract under Rev. Stat., secs. 5523-5525, the title being retained until full payment of the purchase price. No cause against the petition was shown by the answer. *Held* that an order denying the petition had the effect of a final judgment disposing of the rights of the petitioner and that error lay to review it. (456, 457.)

Error to Denver District Court. HON. GEORGE W. ALLEN, Judge.

Mr. M. K. EDWARDS, Mr. B. B. LASKA, for plaintiff in error.

Mr. GEORGE L. NYE, Mr. W. W. GARWOOD and Mr. HARRY C. RIDDLE, for defendants in error.

Opinion by CUNNINGHAM, P. J.

In June, 1912, defendants in error, Smith and the Trust Company, were appointed by the Denver District Court receivers of the Denver, Laramie & Northwestern Railroad Company. On August 30th of the same year plaintiff in error filed its petition in said receivership proceedings, wherein it is alleged that the assignor of plaintiff in error, the Hicks Locomotive & Car Works Company, delivered to the railroad company in 1910, two locomotives, said locomotives being delivered under an instrument designated "a car trust indenture," which indenture, or agreement, was duly executed and recorded pursuant to the provisions of sections 5523, 5524 and 5525 R. S. 1908; sections 6172, 6173 and 6174 M. A. S. (1912).

The railroad company, as a part of the aforesaid transaction, executed and delivered to plaintiff in error's assignor, notes aggregating an amount equal to the purchase price of said locomotives, to-wit, $13,600, less some $4,500 paid in cash. At the time of the appointment of the receivers the railroad company had paid all but $500, which was represented by a note long past due. The agreement between the plaintiff's assignor and the railroad company provided, among other things, that the title in the locomotives should not vest in the railroad company, but should remain in the vendor, plaintiff's assignor, until the full sum provided by the contract had been paid by the railroad company, and further, that in the event of default by the railroad company to fully carry out the provisions of the agreement, the vendor, plaintiff's assignor, "may resume possession of said

locomotives, and the contents thereof * * * and may thereafter sell the same at public or private sale," under conditions with reference to the selling and the disposition of the proceeds not necessary to be here set forth.

In its petition plaintiff prayed that an order might be entered directing the receivers to forthwith turn over to it the said locomotives. The receivers answered the petition of plaintiff in error, admitting all the allegations thereof, "but denying the legal effect alleged and claimed for said facts," (referring to the facts set up in the petition or complaint), and alleging further that "owing to certain facts and conditions, and certain matters of litigation and controversy, not absolutely within the control of said receivers, they have been unable to either confirm and carry out the contract between the Denver, Laramie & Northwestern Railroad Company, and the Hicks Locomotive & Car Works, a corporation, predecessor in interest to the said Locomotive & Car Works, alleged, set forth and attached to said petition, or, whether they would repudiate and disaffirm said contract."

We take it from the quotation last made from the answer of the receivers that they mean to allege that they have, for the reasons therein stated, been unable to determine whether they would affirm the contract of conditional purchase made between the railroad company, and the assignor of plaintiff in error, or whether they would repudiate the same. In the first place it will be observed that the allegation of the answer, above quoted, is couched in the most guarded and indefinite language possible. The nature of the "certain facts and conditions, and certain matters of litigation and controversy" which were "not absolutely within the control of said receivers" is not disclosed, nor is it stated why the receivers had been unable to determine whether they would confirm or repudiate the contract. It is not alleged that they were not possessed of sufficient

funds. So far as this allegation goes their uncertain situation was due entirely to a mental attitude.

On the coming in of this answer plaintiff in error filed a motion for judgment on the pleadings. This motion was denied, and upon this order of denial the case is brought here by plaintiff in error for review. No contention is made in the briefs, or on the oral argument, that the order of the court denying the motion for judgment upon the pleadings was not a final determination of the petitioner's rights, or that it was not a judgment or order to which a writ of error would lie.

In their briefs and on oral argument the chief contention of the receivers and the Bankers' Trust Company, (the latter representing certain bond-holders), seemed to be that because of the *quasi* public character of the railroad company, plaintiff was not entitled to a summary order for possession of the locomotives, even though its title and the allegations of its petition were confessed; that the court having charge of receivership proceedings had authority, within certain bounds, to postpone plaintiff's remedy in the interest of the public, and other creditors of the railroad company.

This contention appears to find support in the opinion rendered in *Frank v. Denver & Rio Grande Ry. Co.*, (C.C.) 26 Fed. 123. In that case Judge Hallett held that the payment of a claim of a creditor, situated somewhat similar to the plaintiff in error, ought to be postponed or deferred, as to the principal sum, until other defendants "on an equal footing, if not in advance, of the rolling stock contracts, should be satisfied." The peculiar facts in the *Frank* case made this ruling of Judge Hallett's highly equitable. In that case it appears that the creditors to whom Judge Hallett referred as being "on an equal footing, if not in advance of the rolling stock contracts," were laborers who "wrought and gave of their substance under promise of prompt payment from the railroad company." Moreover,

the record in the *Frank* case "disclosed that payments made by the receivers under these contracts (with the rolling stock people), have so absorbed the earnings of the road that the orders of the court relating to labor and supply demands remain in large part unexecuted." Judge Hallett in the *Frank* case, nevertheless, ordered that the interest on the claim of the rolling stock people should be paid from the income of the road.

There is no allegation in the answer in this case to bring it within the ruling laid down by Judge Hallett. The record shows that the receivers have paid no interest, and nothing upon the principal of plaintiff's claim, though the same was long past due, and was in default when they took possession of the road. There is no allegation that there were overdue labor bills, or that there was any other claim against the estate which was on an equal footing with plaintiff's claim. And, further, we find no allegation in the answer from which even an inference can be drawn that the locomotives were necessary to the maintenance of the road, or that turning them over to the possession of the plaintiff would, in any wise, embarass the receivers.

While it is true that the appointment of a receiver frequently leads to a conflict of rights as to the possession of property, and while it is true that the court having jurisdiction of the estate will not permit third parties to interfere with the receivers' possession without its consent, still the courts never unecessarily interfere with the rights of third persons to repossess themselves of their own property. Indeed, unless it is made affirmatively and clearly to appear that for some reason recognized by the rules of equity, the rights of third persons ought to be postponed, it is the duty of the court having jurisdiction of the estate to facilitate their efforts to enforce such rights. (This is the plain duty of the court even where the rule is not changed or affected by statute.)

Our statute provides that "Every such contract, specified in sections 1 and 2 (and the contract here under consideration was such a contract), shall be good, valid and effectual, both in law and *equity*, against all purchasers and *creditors*," sec. 6174 M. A. S. (italics ours), on condition, of course, that the contract has been acknowledged, recorded, and the locomotives properly marked, etc., all of which provisions, it is admitted, plaintiff in error had strictly complied with.

The opinion in *Frank v. Denver & R. G. Ry. Co., supra,* was handed down in February, 1885. The statute from which we have quoted became effective in 1905, and the previous statute of 1885 did not go into effect until a month after the opinion in the *Frank* case was rendered. The contract or agreement involved in the *Frank* case was entered into in 1878, hence it will be seen that there was then no statute making such contracts "good, valid and effectual * * * against all purchasers and creditors."

To hold that plaintiff's right in this case to repossess itself of the locomotives in question, under the circumstances here disclosed, must be deferred or postponed to the rights of other creditors would be to nullify the statute upon which plaintiff relied, and upon which it had a right to rely, when it entered into the agreement with the railroad company. Indeed, by a well known rule of construction the sections of our statute referred to must be held to have been written into and to have become a part of the agreement or contract which we are considering. But, the statute aside, the conclusion that we have reached in this case is not believed to be in conflict with any authorities cited by defendants here.

In *U. S. Trust Co. v. Wabash West. Ry. Co.*, 150 U. S., 300, 37 L. Ed., 1085, 14 Sup. Ct., 90, it is said:

"The court did not bind itself or its receivers (to pay the agreed rental of a leased line), *eo instanti* by the mere act of taking possession. Reasonable time necessarily had

to be taken to ascertain the situation of affairs."

In other cases cited by defendants in error a similar ruling is announced. In some of these cases the attempt was being made to hold the receivers to a hard and fast contract possessing no alternative feature.

In this case, as will later be seen, plaintiff seeks to do nothing more than to require the defendants to make an election between paying the small balance due and surrendering the two locomotives.

It ought not to require much time for defendants to elect between paying a balance of $500 on a $13,600 contract and delivering two locomotives, for which the railroad company had obligated itself to pay the latter sum. Especially would this appear to be true if these locomotives were indispensable to the operation of the railroad system. Defendants had had from June 13th, 1912, (the day of their appointment), to August 30th (the date of demand made upon them by plaintiff for possession), in which to determine whether they would affirm the contract, and pay the balance due, or turn back the machinery. If this were not ample time in which to decide so trivial a matter, the receivers should have been able to settle it when they filed their answer on December 11th, more than three months later. The motion for judgment on the pleadings was not filed until January 31st, 1914, and was not heard until March 12th, 1914, one year and nine months after plaintiff in error had filed its petition demanding possession. We feel, therefore, justified in saying that if there existed any peculiar circumstances or facts making an election on the part of defendant in error, after so long a time, impossible or unreasonable, they should have disclosed same in their original answer.

On the oral argument counsel for the plaintiff in error repeatedly asserted that his client had no desire to take any advantage of the defendants, and desired nothing further than that the amount of money yet due on its contract,

together with the stipulated expense of enforcing its legal and equitable rights, should be paid.

The judgment of the trial court will, therefore, be reversed, with directions that the motion of plaintiff for judgment on the pleadings be granted, and that a judgment be entered on such motion in favor of plaintiff in error, requiring the receivers to forthwith surrender possession of the locomotives, or pay, within thirty days from the date of entering judgment, the balance due plaintiff in error under the terms of the contract sued upon.

Reversed with directions.

On Petition for Rehearing.

In the opinion handed down, we stated the fact that no contention was made by defendants in error, in the briefs or on oral argument, that the order of the court, to review which the writ of error was sued out, was not a judgment or order to which a writ of error would lie. The petition for rehearing is based solely upon the assertion that the order denying judgment in favor of plaintiff on the pleadings was an interlocutory order, and not subject to review by this court, for which reason it urged that this court is without jurisdiction to hear and determine the issues. That question having been for the first time raised on petition for rehearing, we should decline to consider it were it not jurisdictional. Section 6, chapter 6, Laws 1911, provides that "Writs of error shall lie from the supreme court to every final judgment, decree or order, of the district court." Strictly speaking, the order under consideration was not in form a final judgment, and did not in a formal manner finally dispose of the issues; but, from an examination of the pleadings, it appears that no issue was made upon any question of fact, the only question for determination being one of law, namely, as to whether, under the admitted

facts, The Central Locomotive & Power Works was the owner and entitled to possession of the locomotives, as claimed by it, or merely a lien holder, as asserted by the defendants in error. Upon that question we have ruled that the judgment should have been in favor of plaintiff in error. There is nothing left for the trial court to determine. We think that the order of the court denying the motion for judgment on the pleadings, predicated as it must have been upon a determination adverse to plaintiff in error as to its ownership and right to possession of the property, had the force and effect of a final judgment or order disposing of the rights of petitioner. Indeed, the defendant in error so treated it at all times, until presenting this petition for rehearing. The court should regard the substance and effect of the order, rather than its form, and so considered, it is subject to review by writ of error.

The petition for rehearing is denied.

[No. 4164.]

RINDERLE ET AL. *v.* MORSE.

1. APPEAL AND ERROR—*Depositions—Effect.* Where the evidence is by deposition the court of review has the same opportunity to judge of its weight as the court below. A decree manifestly inequitable, and against the weight of the evidence, reversed. (463.)

2. SPECIFIC PERFORMANCE—*Discretionary.* In general specific performance will be granted, only when, in view of all the circumstances, it is manifest that justice will be subserved. It is not sufficient to show a perfect legal obligation to perform the contract relied upon. It must also appear that specific performance will work no hardship nor injustice. (465, 466.)

The evidence examined and the contract appearing to have been obtained by wilful misrepresentation of fact, and to involve serious loss to defendant, a decree directing specific performance was reversed. (466,467.)

Error to Mesa District Court. HON. CHARLES CAVENDER, Judge.

Mr. N. C. MILLER and Mr. HENRY TUPPER for plaintiffs in error.

Messrs. BURGESS & KINARD and Messrs. BULLOCK & WALKER for defendant in error.

BELL, J.

E. P. Morse, hereinafter called plaintiff, seeks to enforce against Charles Rinderle and Sophia Rinderle, his wife, hereinafter called defendants, a specific performance of the following contract, to-wit:

"Whitewater, Colo., March 9, 1912.

"This contract entered into this 9th day of March between Chas. Rinderle and Sophia Rinderle and E. P. Morse.

"E. P. Morse trades Mr. Rinderle 160 acres in Douglas Co., Mo., free of all incumbrance, and is to receive the SE¼ SW¼ SE¼ Sec. 14, Twp. 2 S. of R. 1 E. Ute M., NW¼ NW¼ SE¼ Sec. 14, Twp. 2 S., R. 1 E., Ute M., Twp. 2 S. of R. 1 E., Ute M., 20 acres, more or less, also all the equipment, household and kitchen furniture, together with all water rights clear of incumbrance, with abstract and taxes up to date.

"Morse is to furnish abstract and taxes up to date.

"Charles Rinderle.

"Sophia Rinderle.

"Deeds to change March 21, 1912.

"E. P. Morse.

"Anna Morse."

This contract is incorporated in and forms the basis of the complaint. The answer alleges the value of defendants' property mentioned in said contract at $6,000, and sets up as a defense to the action that defendants were induced to enter into said contract by the false and fraudulent representations made by and on behalf of the plaintiff, whereby, in signing said contract, they believed to be true, among

other things, that plaintiff's land mentioned in said contract was well worth the sum of $6,000. These matters were denied, and put in issue by the replication, and after a trial to the court without a jury, a decree was entered in favor of the plaintiff as prayed for.

It appears from the record that defendants, at the time of the trial, had been living at Whitewater, Colo., upon their lands described in the complaint, for a period of 20 years, and were then living there with their family of 6 children. Being desirous of trading or selling their property, so as to change their location in order to be closer to a catholic church and school, wherein they could have their children instructed in the principles of their faith, they made known their desires to a Mr. Leonard Downing, who subsequently learned from a Mr. Alfred Meyers, plaintiff's brother-in-law, who resided at Fruita, Colo., as did also the plaintiff, that a trade might be effected for plaintiff's farm of 160 acres in Missouri. Downing then arranged a meeting between defendants and Meyers, at which a trade of the properties was first discussed between them, and after informing plaintiff of the prospective trade, Meyers investigated defendants' property at plaintiff's suggestion, conducted practically all of the negotiations on the part of the plaintiff in the matter of the proposed trade, prepared the contract in suit for execution, secured the signatures of the parties thereto, and was plaintiff's principal witness at the trial.

The evidence clearly shows beyond dispute that defendants' purpose in desiring a trade or sale of their premises was to locate closer to a Catholic church, they then being 17 miles distant from the church with which they were affiliated. They testified that Myers represented to them that there was a Catholic church at Burnham, Mo., and that Burnham was only about 8 miles from plaintiff's property, with a good level road leading thereto; that the nearest post office to the property was a half mile therefrom; that the premises were under good fence, and contained from 70 to 80 acres of

bottom land, with soil from 6 to 8 feet deep, two sets of buildings in good condition, a good new barn and outbuildings, an orchard of 100 Elberta peach trees, and 100 apple trees, all in good bearing, some valuable timber, and a spring that could be conducted to the house at a cost of about $10; that a quarter of the crop raised on the land during the year 1911 amounted to between $300 and $400; and that the property was worth $6,000, and every dollar of it, so much so that plaintiff would not consent to pay any commission on the trade.

They also testified that they were opposed to signing the contract until after they had made an investigation of the property, but that Meyers insisted upon them signing it, saying "it is simply to show my brother-in-law you intend to trade, because he might trade the place to somebody else if I have nothing to show," and assuring them if conditions were not as represented by him the properties could be traded back any time within 3 months, 6 months or a year.

Rinderle testified that Meyers promised to furnish him with the nearest post office address, and a description of plaintiff's property when he returned the copy of the contract signed by plaintiff; that, after waiting several days for this description, and failing to receive the same, he became uneasy and called to see plaintiff in regard thereto at his home; that Morse was absent when he called, and upon inquiring of Mrs. Morse, he learned from her that Burnham was 12 or 13 miles from the Missouri property, and that there was no Catholic church at that place, but that there was one at Willow Springs, 17 miles from the farm; that he was surprised upon receiving this information, and upon his return home, he wrote plaintiff, among other things, as follows:

"I told Mr. A. S. Myers that one of my main objects in trading is to get nearer to a Catholic church, and Mr. Myers told me positive that there is a Catholic church at Burnham, and Burnham is only (8) eight miles from your

place, but I found out today that there is no Catholic church at Burnham and it is 12 miles from your place. I am sorry that this has went so far. It has put me out a great deal, the same as you, but if Mr. Myers would have told me the truth about the distance to church, I would never have talked about trading."

This letter was written March 12, 1912, only 3 days after the contract was signed, and while the facts of the transaction were fresh in the memories of the parties.

He also testified that after further conferences, he executed a deed for his premises, and on March 21st, 1912, when the deeds were to be exchanged, he left it with a Mr. Marsh, pending a further investigation of plaintiff's property, which he desired to make. Up to this time plaintiff had not secured an abstract to his property as required by the contract, and the property was encumbered by a mortgage, which he was arranging to satisfy when the trade should be completed. In the course of his further investigation, Rinderle wrote the tenant of the Missouri property, informing him that he had purchased the property, and consenting to the tenant's occupation of the premises for the remainder of the season. He also inquired of him as to the condition of the farm, and as to its distance from Willow Springs, and whether or not there was a Catholic church at this last named place. Prior to a tender by plaintiff of an abstract to his property, or a performance on his part of the material conditions of the contract, Rinderle, in reply to his inquiries, learned from the tenant that the property was located 12 miles from Burnham; that it might sell for from twelve to fifteen hundred dollars; that the rent for the year 1911 amounted to but $55; and that part of the land was wet, and the soil of the balance very thin. As a result of this, with other, information, defendants were fully satisfied of the falsity of the representations made by and on behalf of the plaintiff, and refused to permit the deed to be delivered, or to proceed further with the trade.

Both Meyers and plaintiff denied that they made any representations other than such as were contained in an alleged written description of the Missouri property, which was received in evidence on behalf of the plaintiff, and which Meyers testified he delivered to Mr. Rinderle, who read and returned it to him before the contract was signed. Both defendants, however, denied that they ever read or received such a description, and swore that Meyers pretended to read from a paper, which he represented to be a written description, and immediately returned it to his pocket. The paper offered and received in evidence contained only general statements that could have been applied to almost any farm of the same size, and of almost any value, and has all the appearances of a self-serving instrument; for it is a significant fact that while it was supposed to have been prepared by plaintiff for the use and benefit of the defendants, and given to Meyers to be delivered to them, it nevertheless, was returned by Myers to Morse, who thereafter retained possession of it.

It is shown that plaintiff well knew the condition of his property, and refused to reside on it after having visited and inspected it for that purpose. This knowledge on his part is a fairly good indication that the value of $6,000 placed upon it by him, according to his own and Meyers' testimony, and so represented to defendants by Meyers, was very much inflated and well calculated to deceive. The undisputed depositions of defendants' four witnesses in Missouri show beyond question that the property at its highest value was not worth more than one-fifth of the value placed upon it by the plaintiff. All of those witnesses had lived on or about the property, were well acquainted therewith for 20 years and upwards, did not know either of the defendants, and were not interested in the result of the controversy. They all valued the land itself at only $800, and one of them, who had lived on the premises, valued the land with fences, buildings and appurtenances at $1,000, and another, who

was county clerk of the county in which the property was located, and had lived in the vicinity of the property practically all of his life, valued both the land with its fences, buildings and appurtenances at $1,200 or $1,300 which was the highest value placed upon it by any of the witnesses, all of whom swore that the farm consisted of about 80 or 90 acres of bottom land, with soil from 3 to 5 inches deep, and the balance in upland, very hilly, rocky and rough, and not capable of cultivation; that the farm contained only a few peach and apple trees, and very little or no marketable timber, and was enclosed by a patched up, decayed fence, which was in a bad state of repair; that the buildings on the land were small and rough, and mostly in a bad state of repair; that the property was from 11 to 14 miles from Burnham, and the road leading thereto, for a distance of 3 miles, was very rough, hilly and rocky; that there was no Catholic church at Burnham, and none closer to the property than 18 or 20 miles; and that the nearest postoffice to the farm was a distance of 2 miles.

This testimony appears by depositions, as does also that of Mr. Downing, and, of course, this court has the same opportunity to judge of its weight as the trial court had. The trial court, however, seems to have entirely overlooked the depositions, and the principles of equity in its consideration of the case, as its principal findings, and the decree entered, appear to be based largely upon a strict application of legal rules to the disputed evidence offered by and on behalf of the plaintiff. In its findings of facts, the trial court said: "This may or may not be an advantageous contract for the defendant. There is no evidence in the case as I recall of any value being placed on the Whitewater property."

If it were necessary for the defendants to establish the value of their property, which we do not concede, and need not decide, we think there is ample evidence in the record to show that it was of a much greater value than

that of plaintiff's, and that the contract sought to be enforced is manifestly unfair in view of plaintiff's knowledge of the condition of his property and the excessive valuation placed thereon by him. Downing, who was instrumental on behalf of the defendants in bringing about the proposed trade, and who was present at most of the negotiations between the parties, fully corroborated the defendants in the matter of the representations alleged to have been made by Meyers and the plaintiff. As before stated, his testimony appears by deposition, and in them he swore, among other things, that plaintiff assured Mr. Rinderle that the Missouri property was as Meyers stated it to be, and that he could not afford to pay a commission on the trade, as his farm was worth $6,000, but that later he agreed to give Downing 10 stands of bees, that were on the Rinderle ranch, as his commission for his assistance in negotiating the trade. He also swore that the Rinderle ranch consisted of 20 acres with full water rights, and that the equipment on the ranch, which was included in the contract, was worth $1,000, and that the value Rinderle placed on his ranch was $5,000.

Here is positive and undisputed evidence in itself that the personal effects alone of the defendants were worth fully the value of plaintiff's entire property, as placed upon it by one of the witnesses, and within two or three hundred dollars of the highest value placed upon it by any of the witnesses, other than the plaintiff himself. It is apparent, therefore, that plaintiff's property was valued by him at least five times higher than its greatest possible worth as testified to by disinterested witnesses who were familiar with its condition and location, and that under a specific enforcement of the contract, defendants would be required to surrender a 20-acre farm with full water rights, of such substantial value at least as to support a thousand-dollar equipment, together with the equipment itself, for a farm worth not more than defendants' equipment alone, and which could

not answer the purpose for which a trade was desired by them.

Nothwithstanding this direct evidence, it is elementary, as is well stated in *Merritt v. Wassenich,* (C.C) 49 Fed., 785, 788, and recognized in many other authorities, too numerous to mention, that

"The relief here asked (specific performance), is not a matter of absolute right to either party. It is a matter resting in the discretion of the court, *to be exercised upon a consideration of all the circumstances of the particular case.* The discretion which may be exercised is not an arbitrary or capricious one, but is controlled by the established doctrines and settled principles of equity. In general relief will be granted when it is apparent *from a view of all the circumstances* of the case the ends of justice will be subserved, *and it will be withheld when from a like view it appears that it will produce hardship and injustice to either of the parties. It is not sufficient to show that the legal obligation under the contract to do the specific thing desired may be perfect, but it must also appear that the specific enforcement will work no hardship or injustice.*" (Italics are mine.)

The origin and ground of equity jurisdiction in cases of specific performance arises from the fact that a compensation in damages is inadequate, and a specific performance should not be decreed unless the agreement has been entered into with a reasonable fairness without material misapprehension, misrepresentation or oppression: *Frisby et al. v. Ballance et al.,* 4 Scam. (Ill.), 287, 299, 39 Am. Dec. 409.

In Pomeroy on Contracts, 2nd Ed., sec. 175, page 244, it is said:

"The principle, that he who comes into the court seeking equity—that is, seeking to obtain an equitable remedy—must himself do equity, means not only that the complainant must stand in conscientious relations towards his adversary, and that the transaction from which his claim arises must be fair and just in its terms, but also, that the

relief obtained must not be oppressive nor hard upon the defendant, and must be so shaped and modified as to recognize, protect, and enforce all *his* rights arising from the same subject-matter, as well as those belonging to the plaintiff. By virtue of this principle, the specific performance of a contract will be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, *by non-disclosure* of important facts, by trickery, *by taking undue advantage of* his position, or by any other means which are unconscientious; and when the contract itself is unfair, one-sided, unjust, unconscionable, or affected by any other such inequitable feature, or when the enforcement itself would be oppressive or hard upon the defendant, or would prevent the enjoyment by him of his own rights, or would in any other manner work injustice."

The principle, that he who seeks equity must do equity, applies with full force to the facts attending the case at bar. The plaintiff had every advantage in executing the contract, and every reason to desire its enforcement. He was familiar with both properties, while defendants resided in Colorado, far removed from plaintiff's property in Missouri, and depended entirely upon the veracity and honesty of their informers as to its location, condition and value. With these advantages, plaintiff failed to make known to defendants the material facts of which he had knowledge, and which, when brought to their attention, caused them to revoke the contract. Further, according to Downing's depositions, Meyers—of whom the trial court said in its findings of facts "seems to have been somewhat of a trader"—admitted to him that he had a hard time in having the defendants sign the contract, and stated that "he had them tied up all right," and Mr. Berry, defendants' counsel and receiver at the U. S. Land Office at Montrose, testified that when he told Meyers that gross misrepresentations had been made about the Missouri land, the roads, the church, and other things, he, Meyers, interrupted and said "Yes, but he (Rinderle)

signed the contract; that has nothing to do with it; it ain't in the contract," all of which Mr. Berry testified he noted at the time it was said.

It is not probable that a man, having the purposes that defendants had, would contract for the trade of a 20-acre farm, with full water rights and a thousand-dollar equipment, for a property such as plaintiff's on the meagre representations contained in the written description hereinbefore mentioned, notwithstanding the testimony of Meyers and the plaintiff to the contrary; and in view of the facts and strong circumstances herein pointed out, it is hardly necessary to further review the evidence to show that the trial court erred in overlooking or failing to properly consider material undisputed evidence on behalf of the defendants, and that its decree is contrary to the weight of the evidence and the principles of equity.

Therefore, the decree should be, and is, hereby reversed.

Reversed.

Decided July 6, A. D. 1915. Rehearing denied July 23, A. D. 1915.

[No. 4165.]

STARBIRD V. DAVIS.

1. EVIDENCE—*Admissions.* The testimony of one party not contradicted by his adversary is admitted. (469.)

2. CONTRACT—*Construed.* Defendant employed plaintiff to find a purchaser for certain lands, live stock, and other chattels. Plaintiff produced purchasers with whom defendant entered into a contract to the effect that the purchasers should take possession and manage the properties, with power to sell the personalty, and, when paid a certain sum, defendant would convey an undivided interest, etc. Of the same date defendant executed a writing certifying that there was due plaintiff a sum specified, as commissions under this contract, payable at a certain rate per cent upon all sums which he should receive, etc., and "whenever said contract is canceled, or waived by me, I agree to pay any unpaid balance due." Defendant afterwards released the purchasers. *Held* that the whole commission became at once due and payable. (468, 470.)

Error to Denver District Court. HON. J. W. SHEAFOR, Judge.

Mr. GEO. B. CAMPBELL, for plaintiff in error.

Messrs. MCKNIGHT & HENRY, Mr. CARLISLE FERGUSON, for defendant in error.

KING, J., rendered the opinion of the court.

For the purposes of this opinion, Frank B. Davis will be called plaintiff, and George A. Starbird defendant, as in the trial court. Plaintiff brought suit on the following written instrument, executed and delivered by defendant:

"This is to certify that there is due F. B. Davis from me as commission on account of a contract of even date herewith between myself and Proctor Bros. of Verde, Colorado, the sum of eight hundred seventy-five dollars payable at the rate of 2½ per cent on all sums, whether cash or property, received by me on account of said contract. Whenever said contract is cancelled or waived by me I agree to pay any unpaid balance due on this obligation, at once.

In token whereof witness my hand and seal this 30th day of April, A. D. 1910.

Geo. A. Starbird (Seal)."

Plaintiff was a real estate agent, and was employed by defendant to procure a purchaser for certain lands, cattle and other property, owned by defendant. Plaintiff produced purchasers satisfactory to and accepted by defendant, in Proctor Brothers, and the "contract of even date" mentioned in the instrument sued on was a written contract of purchase and sale entered into by and between the defendant and Proctor Brothers. Among other things it provided that Proctor Brothers take immediate possession of lands, cattle, horses and other property of defendant, and manage the same, with power to sell the personal property as provided

in the contract, and that when the sum of $35,000 should be received by Starbird, either from Proctor Brothers or from the sale of any part of said property, then he would convey to Proctor Brothers an undivided one-half interest in all the lands, and transfer an undivided one-half interest in all horses, cattle and equipment, not previously disposed of. Under that agreement Proctor Brothers took charge of the ranches, stock, etc., and, so far as appears carried out the contract for about seventeen months. After that time defendant released Proctor Brothers from their obligations, as evidenced by the following written entry made on the margin of the record of the agreement aforesaid:

"We mutually agree to release one another from this agreement.

George A. Starbird,
Proctor Brothers."

Defendant admitted the execution and delivery of the instrument on, but testified that it was understood between him and the plaintiff that the commission earned was to be paid only out of the moneys received or for property sold under the terms of the contract, and that nothing had been received by him; but his own testimony tended to show and would support a finding that he did receive from Proctor Brothers, or otherwise took and disposed of and retained proceeds from, a portion of the stock which, under the contract, they had a right to sell and apply on the purchase price. Plaintiff did not, on the trial, contradict defendant's testimony as to the understanding or agreement that the commission was to be paid to him out of cash or property received by defendant under the contract; so that will be taken as admitted. In that respect the written agreement and the oral testimony agree.

It is perfectly clear from the contract sued on, as supplemented by the oral testimony, that plaintiff was willing to accept his commission in installments, as paid on the contract of purchase and sale, provided defendant should not

release Proctor Brothers therefrom; but he insisted, that if defendant should cancel the contract, or waive its performance he should be liable for the entire commission and that condition was incorporated in the agreement sued on. Defendant having released Proctor Brothers, the whole amount of the commission became at once due and payable, under the express terms of that agreement. We discover no ambiguity in that instrument. So far as defendant's testimony of a parol contemporaneous agreement tended to contradict or vary that portion of the written instrument which fixed a liability upon him, in case he should cancel or waive the contract, it was incompetent and properly rejected by the trial court.

Judgment affirmed.

[No. 4029.]

EISENHART V. CITY AND COUNTY OF DENVER.

1. CONVEYANCES—*Construction.* In construing a conveyance of a lot in a townsite, reference may be made not only to the history of the title as appears in the conveyances, and the other evidence contained in the record, but to the statutes relating to the townsite at the date of the conveyance. (474.)

In construing a deed from the probate judge, holding title to the townsite of Denver in trust for the occupants, it was assumed that such probate judge had notice that only a particular survey and map of the townsite was of record in the office of the recorder of the county, and of the purpose and efforts of the city authorities, and the people of the territory, to control the bed of a certain stream within the townsite, and that he was influenced thereby in passing upon the proofs of occupancy by the claimant of a lot, and in the conveyance executed pursuant to such claim. (475, 476.)

Where there are conflicting surveys and maps of a townsite, an express reference to one of these, in a conveyance of a lot in such townsite controls, and limits and restricts all subsequent conveyances in the same chain of title to the bounds and dimensions set down in such map. (476.)

2. —— *Of Premises Abutting on a Water Course.* The proprietor of lands bounded by a water course may restrict a conveyance of such lands to specified limits, reserving the water course, and any right in the frontage

thereon; and when anything appears to indicate such intention in a conveyance of the premises, such intention will prevail over any presumption carrying the conveyance to the thread of the stream. (479.)

The probate judge holding title to the townsite of Denver, in trust for the occupants, made a conveyance as such trustee, to a lot bounded on Cherry Creek. On the same day he conveyed to the City the whole bed of Cherry Creek not theretofore conveyed. *Held* to manifest an intention to separate the ownership of the bed of the stream from the ownership of the lot, and to overcome any presumption which might otherwise be indulged that the conveyance of the lot carried title to the center of the stream. (478.)

3. EVIDENCE—*Judicial Notice,* taken, of the character of a certain stream, and the devastation and damage occasioned by it, in seasons of flood. (476.)

4. DENVER—*Boyd Survey—Ebert Survey.* The probate judge of Arapahoe County, acting as trustee for the occupants of the townsite of Denver, executed a conveyance of a lot bounded upon Cherry Creek, not referring to any map or plat for the description. The only map then upon record in the office of the recorder of the county was that of Ebert's Survey. The contrary not being shown, it was held that the conveyance must be construed to refer to the only map so of record. (476, 477.)

Error to Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. B. C. HILLIARD and Mr. J. R. ALLPHIN, for plaintiff in error.

Mr. I. N. STEVENS, Mr. G. Q. RICHMOND and Mr. J. H. MOORE, for defendant in error.

BELL, J.

This action grows out of a dispute between plaintiff in error and defendant in error, plaintiff and defendant respectively in the trial court, and hereinafter so referred to, over title to and right of possession of certain parts of lots 8, 9 and 10, block 103, in the East Division of the City of Denver.

The principal claims of the parties to the property in controversy are based upon two different surveys and maps of the City of Denver, including the East Division thereof, —one made by E. D. Boyd on or about August 8th, 1859,

upon which plaintiff relies, and the other made by F. J. Ebert on or about June 24th, 1865, upon which defendant relies.

It is admitted that in the year 1859 section 33 and the west one-half of section 34 in Township 3 south of Range 68 west of the 6th P. M., was public domain, and that the same was settled upon and occupied as a townsite, and was known and designated as the City of Denver. In the year last above mentioned, and before the incorporation of the City of Denver, the Boyd survey and map were made, which located, marked and numbered the lots and blocks, and fixed, located and named the streets and alleys of said townsite. On or about November 7th, 1861, the City of Denver was duly incorporated as a municipal corporation, under and by virtue of a special act of the legislature of the then territory of Colorado; and on May 6th, 1865, under and by virtue of the terms and conditions of acts of congress approved respectively May 23rd, 1844, and May 28th, 1864, one James Hall, then Probate Judge of the County of Arapahoe in the territory of Colorado, duly entered, in the United States District Land Office, the lands so settled upon and occupied as a townsite, in trust for the use and benefit of the occupants thereof, as townsite settlers, according to their respective interests therein. On or about June 24th, 1865, one F. J. Ebert, under the direction of the city council of the City of Denver, made a survey and map of said townsite of the City of Denver, which said survey and map were filed in the office of the Recorder of Arapahoe County, Territory of Colorado, on or about June 29th, 1865. The Boyd survey and map had never been filed in the office of the City Clerk of the City of Denver, nor recorded in the office of the County Clerk and Recorder of Deeds of Arapahoe County, Territory of Colorado, until February 26th, 1876, when by authority of a resolution of the city council of said City of Denver, passed February 24th, 1876, they were so recorded. No official recognition by the City of Denver is shown to

have ever been given to the Boyd survey and map, except such as is expressed in said resolution, which expressly states that said survey and map be recorded for the better preservation of the same, and the reasons given therefor are that said survey and map had not been recorded, and that a majority of deeds conveying property in said East Division of the City of Denver had been made in accordance therewith; but no expression is contained in said resolution tending to show any intention of the city council to substitute the Boyd for the Ebert survey and map, or to make the former an official survey and map. The Boyd survey and map and the Ebert survey and map were in conflict with and differed from each other in that large portions of lots 8, 9 and 10 of block 103, as surveyed and platted by Boyd, were taken from said lots 8, 9 and 10 and surveyed and platted by Ebert as a part of the bed of Cherry Creek. In July 17th, 1865, one Ben Holliday, as provided by the act of the legislative assembly of the Territory of Colorado, providing for the disposition of lots in said Denver townsite, approved March 11th, 1864, duly filed with the Probate Judge of said Arapahoe County his claim to said lots 9 and 10 in block 103, East Denver, and thereafter, on August 11th, 1865, 43 days after Ebert survey and map had been filed for record in the office of the Recorder of Arapahoe County, Territory of Colorado, and over 10½ years before the Boyd survey and map were so filed and recorded, James Hall, then Probate Judge of Arapahoe County aforesaid, duly conveyed said lots 9 and 10 to said Ben Holliday, by deed duly recorded, without making any reference therein to any particular survey or map; and on October 29th, 1872, Henry A. Clough, the then Probate Judge of Arapahoe County aforesaid, and successor in trust to said James Hall, likewise conveyed to James M. Strickler "all that portion or part of said lot eight (8) block one hundred and three (103), East Denver, as lies without the bed of Cherry Creek, according to the map and survey of F. J. Ebert." By virtue

of these deeds and divers and sundry mesne conveyances, plaintiff primarily claims title to said lots 8, 9 and 10, as the same are marked and defined on the Boyd survey and map, and also by virtue of the statutes of limitations. The trial court, sitting without a jury, found the issues joined for the defendant, and rendered judgment accordingly.

The principal question presented on review is whether the plaintiff showed bya preponderance of the evidence that the lots in controversy were conveyed according to the Boyd survey and map. This burden was upon her, and in support of the finding of the trial court that she failed in this respect, the deeds, themselves, for said lots, and the facts and circumstances attending their execution must be considered in order to determine the intention of the parties therein.

As to lot 8, the deed, itself, expressly recites that said lot was conveyed "according to the map and survey of F. J. Ebert," which recital, under the circumstances of the record before us, necessarily controls; and as to lots 9 and 10, in addition to what has herein already been said regarding the conditions existing at and about the time of the execution of the deed thereto from which plaintiff deraigns title, we are at liberty, as was said in *City of Denver v. Pearce*, 13 Colo., 383, 385, 22 Pac., 774, 6 L. R. A., 541, to consider the history of the title to the premises, and a construction of the conveyance under which the plaintiff claims, not only from the evidence, and deeds of conveyance, set forth in the record, but also from the statutes and laws relating to townsites which were in force at the time the deed was executed and delivered.

In the case above cited, at page 388, it is said:

"To acquire control of the bed of Cherry Creek, as defined by the Ebert Survey, had long been the settled policy of the municipal authorities. This policy is clearly disclosed by the record, and by the statutes which were in force at the time this sale was had. By an act approved February 10,

1865, (Colorado Legislature), the city was authorized to 'define and fix the boundaries of the channel of Cherry Creek within the corporate limits of the city; to remove obstructions therefrom; and to prevent persons from obstructing the same.' Pursuant to this act, and on June 22, 1865, by formal resolution, the plat of the city made by F. J. Ebert was approved and ordered to be filed for record in the office of the recorder of Arapahoe County. By an ordinance thereafter enacted the channel of the bed of Cherry Creek, within the corporate limits, was declared to be a public place; and it was further declared to be 'unlawful to place any wall, building, fence, dike, earth, manure, garbage or other obstruction in or upon the same.' By an act of the legislature approved February 9, 1872, it was provided that 'the said city council shall have power and authority to condemn, and appropriate in fee to the use of the city, the strip of land within the bed of Cherry Creek, as defined by the city council. * * *' Sess. Laws, 1872, p. 207. In the light of the statutes, resolution and ordinances cited, it is clear that appellant intended to purchase the bed of Cherry Creek for the benefit of the public. It is equally clear that it was the intention of the trustee, at the time the sale was made, to convey to the city all of the bed of the stream, title to which remained in him. It follows that the trustee must have intended to convey to appellee's grantor a parcel of land bounded, not by the thread of the stream, but by the bank, as defined by the Ebert survey."

The Probate Judges were trustees for the use and benefit of the occupants of the land entered, with power and authority to pass upon the proofs of their occupancy of the land at the date of entry. Therefore, Probate Judge Hall, grantor in the deed now under consideration, and who was also County Judge at the date thereof, had constructive notice, at least, that the Ebert survey and map was the only survey and map of the Denver Townsite filed or of record in the recorder's office of the County of Arapahoe, Territory

of Colorado, at the time the deed was made, and he must have been cognizant, from the statutes, ordinances and resolutions in existence at the time, of the efforts and purposes of the city authorities and the people of the territory to have the bed of Cherry Creek controlled by the city for the benefit and protection of the public, and it is reasonable to conclude that he was influenced by this knowledge in making the deed to the lots in question, and in passing upon the proofs of occupancy submitted by the parties thereto.

In the evidence, it appears from the testimony of plaintiff's husband and other witnesses that in 1879, the premises in dispute were on a level with Cherry Creek; that in 1882, the city drove a line of piling angle-wise with the creek, about 15 feet from the present retaining walls, to confine the floods; that this piling stood about 6 or 7 feet above the ground, and was later reinforced by a slag wall; that the premises were not fenced nor in use below the piling or slag wall; that they were not permanently improved; and were used only for storage purposes for building material and the like.

Further, it is stipulated that, in plaintiff's chain of title to lot 10 from the government to herself, there appears a conveyance from Richard E. Whitsitt to Ira C. Grant dated June 26th, 1877, in which said lot is described as lot 10, block 103, East Division of Denver, "as per map of F. J. Ebert." According to this description, the deed does not purport to convey any part of said lot other than is marked and defined by the Ebert survey and map, and being prior to the transfer of said lot to plaintiff, we are unable to see wherein any deed subsequent thereto could enlarge the grant as therein contained.

It is a matter of common knowledge that Cherry Creek is and has been a torrential stream, most difficult and expensive to confine in any ordinary channel, and frequent floods, prior to the city's building of the present retaining walls, spread over much of the city, and did much damage

to streets, alleys and private property. The duties have been imperative upon the city from the inception of the entry of this townsite to build expensive barriers and retaining walls to prevent the destruction of that part of said lots 8, 9 and 10 not in the bed of the creek, as well as for the protection of other property, and at this late day, the courts should not disturb the public plans or purposes in controlling this creek, unless some clear, legal or equitable right is established by a preponderance of the evidence.

Under the finding of the trial court of the issues in favor of defendant, and the chief issue between the parties being whether the court should be governed by the description of the bed of Cherry Creek as made by the Boyd or the Ebert survey, it would seem that the trial court did not find that plaintiff had established her chief contention that the Boyd survey should control; and failing in this, the record then does not contain the material facts upon which plaintiff must base her claim to title and possession by virtue of the statutes of limitations, even if the provisions of said statutes do operate against a muncipal corporation, upon which question we need not and do not pass.

But it is contended by plaintiff that, if Holliday, from whom she deraigns title to lots 9 and 10 by mesne conveyances, obtained his deed from Probate Judge Hall according to the Ebert survey, then she is the owner of the adjoining bed of Cherry Creek to the centre or thread of the stream, according to the Ebert survey; and further, that if she is to be controlled in her claims by the Ebert survey, she is entitled to the accretions produced by the change in the stream by reason of floods, or otherwise,—or, in other words, that she is entitled to such portion of the bed of Cherry Creek as has been reclaimed, either by natural or artificial means, for the reason that, being a riparian owner, she is entitled to the same length of shore line upon the changed or new bank of the stream as she had originally upon the former or old bank.

If these contentions have any merit, they must be supported entirely by the deeds to lots 9 and 10 from Probate Judge Hall to Holliday, for no such rights can arise from the deed for lot 8 from Probate Judge Clough to Strickler, since the grantor therein, on the same day, by a deed to the City of Denver, conveyed to said city, for a consideration of $5,050, "the whole of the bed of Cherry Creek as the same is marked and defined on the map of said city as per survey of F. J. Ebert from the point where the same intersects the south line of the old bed of the South Platte River to the point where the same intersects the south line of said section thirty-three (33) save and except such parts and portions thereof as may have been heretofore deeded by any Probate Judge since the entry of said land in trust as aforesaid." Under the authority of *City of Denver v. Pearce, supra,* these two deeds,—one for lot 8, and the other for the bed of the creek,—having been executed the same day, show an intention to separate the ownership of the bed of the stream from the ownership of the lot, and overcomes the presumption that might otherwise be indulged that a deed to a lot bounded on an unnavigable stream carries the title to the bed of the stream to its center.

Therefore, the rights of the plaintiff thus contended for must be controlled by a construction of the Holliday deed in accordance with the facts and circumstances attending its execution, so as to learn the intention of the parties thereto. It was the province of the trial court to determine this intention from the attending circumstances and evidence detailed at the trial, and to ascertain whether it was the purpose to convey to the grantee in the deed any riparian rights, or to reserve to the City of Denver all of the bed of the creek in pursuance of the purposes of the legislature expressed in the act of February 10th, 1865, and the resolution and ordinance of the city council passed in conformity thereto; and from the general finding in favor of the defendant, we must infer that the trial court found this issue for the

defendant; and from the facts and circumstances hereinbefore reviewed, including the conduct of the parties benefited by the conveyance, there seems to be sufficient evidence to support the finding. The proprietors of lands bounded on water courses may limit their conveyances thereof within specific limits, and if anything appears which indicates an intention on the part of the proprietors to make such a limitation, and to reserve to themselves any rights in front of the water lots, after they have been sold, such an intention will prevail over any presumption that such conveyances carry title to the bed of the stream to its center: *Watson v. Peters,* 26 Mich., 208; *City of Denver v. Pearce,* 13 Colo., 388, 22 Pac. 774.

It is also argued that plaintiff acquired title to the property in dispute by reason of certain tax sales, and that the city is now estopped from claiming any part of the land, as against her rights, by reason of its conduct in placing said lots upon its block-books and assessing them as full lots of 25x125 feet for taxes and special improvements, and in receiving and collecting such taxes and assessments from plaintiff and her mesne grantors.

To this contention it may be said that it is settled that the levy and collection of taxes on property by the assessors and tax officers of a city will not estop the city from asserting title to the property for the benefit of the public: *Board of Park Commissioners v. Taylor,* 133 Iowa, 453, 108 N. W., 927, 931; *City of Seattle v. Hinkley, et al.,* 67 Wash., 273, 121 Pac., 444, 446.

Under the state of the record before us, we are not able to say that the trial court committed error in holding that the plaintif had not established the material allegations of her complaint by a preponderance of the evidence, as she was required to do; and, therefore, the judgment of the trial court is hereby affirmed.

Affirmed.

Decided July 14, A. D. 1915. Rehearing denied July 26th, A. D. 1915.

[No. 4079.]

FOGG, ADMINISTRATOR V. QUACKENBUSH.

1. APPEALS AND ERROR—*Finding on Conflicting Evidence*, sustained.

2. CONTRACTS—*Validity—Public Policy.* An agreement, made in good faith, between the widow of an intestate, and a creditor, that the latter shall be appointed as administrator, and shall make no charge for his services, is in the interest of creditors heirs and distributees, and is not contrary to public policy. (482.)

The court should not be astute to find reasons to nullify such agreement after it has been acted upon by the parties. (482.)

3. —— *Consideration.* A widow's waiver of her right to make formal protest against the appointment of a particular person as administrator upon her deceased husband's estate, is a consideration for the agreement of the administrator, to serve without compensation. (482.)

4. EXECUTORS AND ADMINISTRATORS—*Liability for Interest.* An administrator who, in all things, has acted in good faith, has not used the funds of the estate, or received any profit therefrom, has made prompt report of his actings and doings in his official capacity, and moved for an order permitting final settlement and distribution, as soon as that was possible, is not to be charged with interest, upon the moneys in his hands during administration. (483.)

Error to Delta District Court. HON. THOMAS J. BLACK, Judge.

Mr. PORTER PLUMB and Messrs. STEWART & KING, for plaintiff in error.

Mr. MILTON R. WELSH, for defendant in error.

MORGAN, J.

This matter was first heard in the County Court, and then, on appeal, in the District Court, and the questions for consideration arise upon errors and cross-errors concerning the findings and the final decree of the latter court, upon issues formed on objections by the widow, now Mrs. Quackenbush, to the final report of the administrator of the estate of her deceased husband.

The District Court disallowed the claim of the administrator for $400, paid to himself as the agreed price of a span of mules sold by him with estate property, but which he claimed to be his private property; and disallowed his charge, as compensation under the statute, for comissions on the sale of the real and personal property of the estate; also ordered him to pay interest, from May 4, 1907, on the entire balance in his hands due the estate.

It will not be necessary to discuss the entire evidence, nor all the legal questions involved. Culwell, the deceased husband, died on January 18, 1907, and Fogg, the largest creditor, was appointed administrator after the time had expired in which the widow had the preferential right to be appointed, and after she had waived such right by praying for the appointment of a third person. The principal asset of the estate was a ranch, that Fogg, the administrator, had sold to Culwell, about two years before his death, for $9,000; and the principal debt was a note for said sum with interest, given by Culwell to Fogg, together with taxes on the land, all secured by a deed of trust on the land. The administrator sold the real estate and the personal property, together, at the request of the widow, and to induce the sale of the land, including the span of mules, and other personal property admitted to be Fogg's for $13,000, all of which was paid in cash except $4,500, paid by a note given to Fogg in his private capacity, and secured by a deed of trust on the land sold.

1. Upon conflicting evidence the court decided that the mules were the property of the estate, and although the

finding was upon a slight showing, we do not feel justified in disturbing it; and, as the administrator withheld the $400 on that account, the judgment, requiring him to add the same to his report of the assets of the estate, is sustained.

2. The disallowance of the charges for commission, as compensation as aforesaid, was made upon a finding supported by evidence that, at or about the time of Fogg's appointment, he agreed with the widow not to make such charge, if permitted to serve. It is contended that such agreement, if made, was contrary to public policy, and without consideration; but it is concluded that such agreements, made in good faith, are manifestly in the interest of creditors, as well as heirs, and have received the approval of courts and text writers, and are not contrary to public policy, Schouler on Wills and Administration, (2nd ed.), sec. 545; 2nd Woerner on Administration, (2nd ed.), star p. 1171; *In re Davis' Estate*, 65 Cal., 309, 4 Pac., 22; *Hilton v. Hilton*, 33 Ky. Law Rep., 276, 109 S. W., 905; *Bate v. Bate* 11 Bush (Ky.), 639.

The preponderance of the evidence seems to show that the alleged agreement was made after Fogg had been appointed, in which case there would seem to be no consideration to support the agreement, but the proof on that point is not entirely conclusive. Moreover, the widow was, at that time, protesting to Fogg against his appointment, in preference to a person of her choice, and the fact that she waived her right to make formal protest to the court affords some consideration. We think the court should not be astute in seeking reasons to nullify such agreement or understanding after it had been acted upon by the parties.

3. Except as to the item of $400, paid to and retained by the administrator, we find nothing in the record to justify the judgment charging the administrator with interest on the funds of the estate received by him. Everything shows that he acted in the utmost good faith, and there is

no finding or suggestion made by either of the trial judges to the contrary. The evidence does not support the finding that the funds of the estate were mingled with the private funds of the administrator, in the sense that he used or invested them as his own; or that they were deposited in his private bank account, and drawn upon as a common fund; or that he received any profit therefrom. He was at all times required to have the assets on hand, ready for distribution or disposition, as, and when, ordered by the court. He made prompt report of all funds received and paid out, and moved for an order permitting final settlement and distribution, immediately after the time fixed by statute for presentation of claims against the estate. The delay in settlement was not caused by him, but by objections made by fourth class creditors against the widow's allowance; and, in part, by objections made by the widow, herself, some of which were to claims made by the administrator which had been approved by her present attorney, acting as administrator, *ad litem*, appointed by the court, to protect the estate against such claims. Even as to the claim for the value of the mules and the one for commission, which were disallowed, the evidence so strongly supports the claim of the administrator, that we find therein no evidence of bad faith on his part. We are pursuaded that to penalize him by a charge of interest on all the funds, in addition to denying him, not only the commission upon a most advantageous sale of the property of the estate, but also denying him any other compensation for his services rendered, is neither equitable, nor justified by any recognized rule of law. At no time did the defendant in error (widow), ask that the funds be invested, and, at no time, until the trial in the District Court, and not then, until during the argument, was an allowance for interest insisted upon.

The judgment requiring the administrator to pay interest on all the funds in his hands is reversed, and the case is remanded with instructions to enter judgment requiring

him to pay interest on the sum of $400, only, at eight per cent. a year from May 7, 1907, until paid. In all other respects the judgment is affirmed; costs of this writ of error to be paid in equal parts by the plaintiff in error and the defendant in error.

Reversed and remanded.

Decided July 14, A. D. 1915. Rehearing denied July 26, A. D. 1915.

[No. 4093.]

RAYMOND ET AL. V. HARRISON.

1. VENUE—*Change of Venue.* Under sec. 27 of the Code of 1887 (Rev. Code, sec. 29) it seems that in an action for the price of goods sold it is the privilege of the plaintiff to designate the county of his residence as the place of trial. An application for a change of the venue, in such case, solely upon the ground that such county is not the proper county, should be denied. (486.)

2. —— *Waiver.* Where an application for a change of the venue is improperly granted, the error is waived by proceeding to trial in the county of the new venue, without objection. (486.)

Eror to El Paso District Court. HON. J. W. SHEAFOR, Judge.

Mr. JOSEPH D. PENDER, for plaintiffs in error.

(No appearance for defendant in error.)

KING, J., delivered the opinion of the court.

On January 30, 1912, plaintiffs in error filed their complaint in the District Court of the City and County of Denver to recover a sum of money alleged to be due and unpaid as the purchase price of merchandise sold and delivered by the plaintiffs to defendant, at Denver, Colorado. Defendant moved for a change of place of trial from the City and County of Denver to the County of El Paso, and supported

the motion by affidavit, which alleged that the defendant was a resident of the County of El Paso, had been served with summons in that county, and that the merchandise was not sold nor delivered to the defendant at the City and County of Denver, but at his place of business in the County of El Paso. The affidavit further stated that the transaction was by telephone, the plaintiffs being in the City and County of Denver, and the defendant at his place of business in Colorado Springs, El Paso County; that the plaintiffs called the defendant, offering to sell him the merchandise; that defendant agreed to purchase the same if upon inspection it was found to be as represented; that the merchandise was sent by express, and when received was rejected, and returned by express to plaintiffs. Plaintiffs filed a counter-affidavit, alleging that they were residents of the City and County of Denver; that by the terms of the agreement the goods were to be delivered, and were delivered, to the defendant by delivery to the Adams Express Company at the City and County of Denver, and that defendant agreed to pay the express charges. Motion for change of venue was granted. Trial to a jury; verdict and judgment for defendant.

The only objection urged here is that the court committed reversible error in granting the change of venue. Section 27, Civil Code, 1887, provides as follows:

"In all other cases the action shall be tried in the county in which the defendants, or any of them may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; * * * Actions on book accounts or for goods sold and delivered, may be tried in the county where the plaintiff resides or in the county where the goods were sold."

We are not disposed to indulge in hair-splitting to determine whether under the circumstances detailed the merchandise was sold in the City and County of Denver as con-

tended by the plaintiffs, or in the County of El Paso as contended by the defendant. It would seem that under the code provision quoted, it was the privilege of the plaintiffs to designate the county of their residence as the place of trial in an action for goods sold and delivered, and that, having so elected, defendant could not as a matter of right demand a change of place of trial. Inasmuch as the motion was based only upon a showing that the county designated in the complaint was not the proper place for trial, we think the motion should have been denied. However, after the granting of such motion and transfer of the cause to El Paso County, the plaintiffs replied to defendant's answer, and voluntarily went to trial without objection to the jurisdiction. The District Court of El Paso County had jurisdiction of the subject matter. It was one of the counties in which the suit could properly be tried; therefore, when plaintiffs, without objection, went to trial, we think they invested that court with full jurisdiction to proceed therein, waived the error in granting the change of venue, and cannot now be heard to urge that objection. *O'Rourke v. O'Rourke,* 58 Colo., 300, 144 Pac., 890; *Greeley & Loveland Irr. Co. v. Farmers' Pawnee D. Co.,* 58 Colo., 462, 146 Pac., 247; *Fletcher v. Stowell,* 17 Colo., 94, 28 Pac., 326; *Christ v. Flannagan,* 23 Colo., 140, 46 Pac., 683; *Phoenix Indem. Co. v. Greger,* 39 Colo., 193, 88 Pac., 1066. In the first two cases cited, motion for change of venue was denied when it should have been granted. It was decided that by going to trial without further objection, the court was reinvested with jurisdiction, and the right to the change was waived. In *Fletcher v. Stowall, supra,* the cause of action was for the foreclosure of a mortgage on real property, being one of the cases in which it is provided that the cause *shall* be tried in the county in which the real property is situate. The action was brought in another county. Nevertheless, the court there held that by failing to appear in answer to the summons, the defendant waived his right to in-

sist upon that provision. We think the principle announced in the foregoing cases is controlling in this.

For the reasons given, the judgment is affirmed.

Affirmed.

Decided July 14, A. D. 1915. Rehearing denied July 26, A. D. 1915.

[No. 4125.]

HENRY V. SEMONIAN.

1. CORPORATIONS—*Liability of Stockholder for Corporate Debts.* One who, in good faith, purchases from the corporation, at less than par, shares of its stock originally full paid, is not liable to creditors of the corporation for the difference between the par value and what he paid. (492.)

2. —— *Stock—Full Payment Presumed.* It is presumed, nothing to the contrary appearing, that in its original issue the stock of a corporation is paid in full. (494.)

3. —— *Creditor's Action Against Stockholder—Burden of Proof.* In the action of a creditor of the corporation against a stockholder the burden of proof is upon the plaintiff to establish that the stock held by the defendant is not full paid. (492.)

Error to Denver District Court. HON. H. P. BURKE, Judge.

Mr. JOHN R. SMITH, Mr. H. B. WOODS, for plaintiff in error.

Mr. T. M. MORROW, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

This action was begun February 21, 1907, by Armenag Semonian, defendant in error (plaintiff below), against George S. Henry, T. C. Henry, and Ellen C. Henry. Plaintiff recovered judgment against George S. Henry, the action

being dismissed at the trial as to the two other defendants. Exceptions were reserved, and the case is here by proper proceedings for determination. We will refer to the parties herein as designated in the complaint.

From the complaint it appears that the action was founded upon sec. 873, Revised Statutes, 1908, and was brought by a creditor of The Henry Investment Company, against defendants, as stockholders, to recover a judgment upon an alleged unpaid portion of their stock, in an amount sufficient to pay the indebtedness due from the company to the creditor. In addition to alleging the indebtedness of the company to the creditor, upon a number of separate causes of action, the amended complaint avers that on September 26, 1905, plaintiff, as creditor, recovered a judgment against said company, on such causes of action in the District Court of the City and County of Denver, in the sum of $1,500.18; that execution was issued thereon, placed in the hands of the sheriff, and returned by him wholly unsatisfied; that said company had no property or assets subject to execution, and that it was wholly insolvent. It is further averred in paragraph "nine" that on August 8, 1895, said defendant George S. Henry subscribed for, and had issued to him, one hundred and sixty-six shares of the capital stock of said corporation, for the payment of which said Henry gave his promissory note in the sum of $1,666; that on the 10th day of September, 1900, the said note was renewed and extended for one year from the last mentioned date; that on or about September 11, 1902, it was resolved by the board of directors that said Henry had made advances and rendered service to the company equivalent to the amount due on his note of $1,666, and that said note be cancelled and surrendered to said Henry in payment of said advances and services; that said note was thereupon cancelled and surrendered to Henry, and he never paid any other or further sum for said one hundred and sixty-six shares of stock—

and that there was then due from said Henry to the company on said stock the sum of $14,934.

The answer makes the following admissions: Admits the incorporation of the company; that the said judgment of September 26, 1905, was recovered against the company, as stated in the amended complaint; that the execution was issued thereon and returned unsatisfied, by the sheriff, as alleged in paragraph six of the amended complaint; that the capital stock of the company was one hundred thousand dollars, divided into one thousand shares of one hundred dollars each, as alleged in paragraph eight of the complaint; and that on August 8, 1895, George S. Henry subscribed for and had issued to him one hundred and sixty-six shares of the capital stock of the company. It is then averred in the answer that the stock was not delivered until on or about September 19, 1912; that on November 4, 1896, the company filed with the secretary of state, and the clerk and recorder of the then county of Arapahoe, its certificate of full-paid stock, in accordance with the laws of Colorado; that for a period of seven or eight years, beginning shortly before 1893 (date of incorporation), Henry had been rendering services, and performing work and labor for the company; and that when the said one hundred and sixty-six shares of stock were delivered to him in September, 1902, the corporation was indebted to him in an amount equal to the full par value of the stock, plus the amount due upon his note of $1,666. This last allegation was denied by the replication.

The nub of this controversy appears to be: As to creditors, was there at the time this action was instituted, an unpaid balance due from George S. Henry upon the one hundred and sixty-six shares of stock owned by him? The evidence upon this issue is meager. The only witness introduced by plaintiff at the trial was defendant T. C. Henry, whom he called as a witness for cross-examination under the statute, and the only substantial facts elicited from him were that he was a director and officer of the company, that the

minute book of the corporation (identified by him), contained the minutes of all the meetings of the stockholders and directors of the company, and that *all the stock of The Henry Investment Company that was issued was in fact fully paid up by transfer to the company of property* consisting mainly, or almost entirely, at the time of equities in irrigation projects, and other equities. Plaintiff then introduced in evidence, without objection, the minutes of the meetings of the board of directors of the company on the following dates: August 7, 1895, August 8, 1895, September 10, 1900, and September 11, 1902. The minutes of a meeting of the board of directors on September 3, 1903, were admitted in evidence, over defendants' objections. The minutes of the meetings on August 7, 1895, and September 10, 1900, do not appear to be of much importance in this issue.

The only evidence offered by defendants at the trial was the testimony of defendant T. C. Henry, who testified as stated.

The findings of the court are in part as follows:

"Doth find the issues herein joined in favor of the plaintiff and against the defendant George S. Henry, upon upon the issues made as to George S. Henry being the owner of unpaid capital stock of The Henry Investment Company, and that the plaintiff is a creditor of said corporation, all other issues being found against said plaintiff."

Section 873, R. S. '08, reads as follows:

"Each stockholder shall be liable for the debts of the corporation, to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided. Whenever any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more stockholders at the same time, to the extent of the balance unpaid by such stockholders upon the stock owned by them respectively, whether called in or not, as in cases of garnishment."

As above shown, T. C. Henry testified that "All the stock of The Henry Investment Company that was issued was in fact fully paid up by transfer to the company of property." This was not denied at the trial. In addition to this it is admitted in the pleadings that on November 4, 1896, the company filed with the proper officers a certificate of paid up stock of the company, as required by sec. 875, R. S. 1908. Assuming this evidence to have established *prima facie* that all of the stock of the corporation was full-paid, as contemplated by secs. 851 and 863, R. S. 1908, it then becomes necessary to examine the minutes referred to, and ascertain therefrom if they overcome or rebut such *prima facie* showing, and in doing so we need only consider the stock owned by the defendant George S. Henry, as the action was dismissed as to the other defendants. The following is from the minutes of August 8, 1895:

"On motion of Ellen C. Henry, duly carried, a proposition of G. S. Henry to give his note for $1,666 to the company in payment for 166 shares of the said stock of the company, to be issued to him, the said stock to be held by the company as collateral to the proposed note, was accepted."

There is no suggestion in this language, as we construe it, other than that said Henry made a proposition to buy the said one hundred and sixty-six shares of stock, par value $16,600, for the sum of $1,666. The proposition was accepted, and he gave his note accordingly. The language is plain and unambiguous, and establishes a clear contract between the parties, showing that Henry purchased the one hundred and sixty-six shares of the capital stock at an agreed price of $1,666. It is clear from the proposition submitted by Henry, and accepted by the company, as shown in the minutes just quoted, that the stock was issued to, and paid for by, Henry, at one and the same time. The evidence of T. C. Henry, that all stock issued was full-paid, stands undisputed. Defendants, at the trial, made a clear effort to prove, by their witness, T. C. Henry, the kind,

character and value, of the property so transferred to the company for its stock, but in such effort were met at every point by objections from plaintiff, and only partially succeeded in making such proof, because of the rulings of the court sustaining the objections made. The stock being full-paid as stated, and there being no fraud alleged or proven in the transaction referred to in the minutes, it becomes immaterial as to whether or not Henry paid only $1,666 for the one hundred and sixty-six shares. If stock in its original issue is full-paid, then there is no law or statute to which we have been referred, or of which we have knowledge, that prohibits a corporation from selling its stock in good faith for less than its par value. In such case the purchaser in good faith at less than par is not liable to the creditors for the difference between what he paid, and its par value. The rule seems to be well established by the general trend of authority that in the absence of statute or fraud a stockholder who obtains his stock in good faith is not liable to creditors for debts or obligations of the corporation; and it seems to be equally well settled that when a creditor seeks to hold a stockholder for indebtedness of the corporation under a statute similar to the one we are considering, the burden of proof is upon him to clearly establish the fact that the stock held by the stockholder sought to be charged is not full-paid, at least to the extent of his claim. If the creditor fails in this regard he cannot recover. *Speer v. Bordeleau,* 20 Colo. App., 413, 79 Pac., 332.

The case of *Merrill v. Timbrell,* 123 Ia., 375, 98 N. W., 879, is a well considered case involving facts quite similar in their import to those of the case at bar. In that case one Lofland, a former secretary of the corporation in question, testified that the stock was full-paid. This evidence being undisputed, the court held that it would have been error if the verdict had been in favor of the creditor.

Plaintiff in his brief construes the language of these minutes as conclusively establishing the fact that $1,666 was

all that was ever paid for the stock, and that the difference between that amount and its par value was still due and owing by defendant George S. Henry. In other words, he assumes that the minutes conclusively refute the testimony of T. C. Henry, to the effect that all the stock issued by the company was full-paid. We do not place that construction thereon. We discover nothing, in the language used, to indicate that this issue of one hundred and sixty-six shares was the original issue of the same. It is a warranted presumption, well sustained by authority, that those shares were full-paid at the date the meeting was held, and this presumption, in the absence of a record showing to the contrary, would continue even if Henry had not testified on the point. That part of the minutes stating that "George S. Henry had made advances for the company and rendered services fully equivalent to the amount due on his note of $1,666," does not preclude the interpretation that the advances made and services rendered may have been to an amount far in excess of said sum. The language used does not limit the amount of such advances and services to the face value of the note. An inference that such advances and services might have been equal in amount to the full par value of the stock, plus the face of the note, would not violate the letter or spirit of the language used in the minutes. We discover nothing therein disproving Henry's testimony that the stock was full-paid.

It must be kept in mind that George S. Henry was not called upon to prove anything in the first instance. The burden was upon plaintiff to make full, clear and satisfactory proof that Henry owned stock of the company upon which the par value thereof, to the amount of the judgment, had never been paid in money or money's worth. Failing in this, plaintiff could not recover. To do so, he must, by proper pleading and proof, bring himself within the statute. As well said by the court in *Merrill v. Timbrell, supra*:

"That defendant was a subscriber to $2,500 of the stock of the company was conceded on the trial, and the vital question of fact presented was whether any part of that subscription was unpaid. Upon that proposition the burden was on the plaintiff. We do not think the action is one in which defendant is obliged to plead and prove payment. The defendant was not, and never has been, in the strict sense of the word, the debtor of plaintiff. In the absence of any showing to the contrary, it was to be presumed that the stock was paid up. * * * It was for the plaintiff, therefore, to bring himself within the benefit of the statute, not only by proof of the defendant's subscription to the stock, but by showing, as well, that there was still something due and unpaid thereon."

In his brief, plaintiff claims that, by admitting the allegations of paragraph eight of the amended complaint, defendants pleaded themselves out of court. That might probably be the case if the printed abstract correctly disclosed the record as to said paragraph. On reading the transcript, we discover that paragraph eight only alleges the amount of capital stock of the company, and its division into one thousand shares of one hundred dollars each The remaining allegations, erroneously stated in the abstract as being a portion of that paragraph, are found in paragraph nine of the transcript, all of which are denied by the answer.

Upon consideration of the entire record, we are satisfied that plaintiff clearly failed to establish, by sufficient proof, the liability of defendant George S. Henry under the statute in question.

The judgment is reversed and the case remanded.

Decided July 14, A. D. 1915. Rehearing denied July 28, A. D. 1915.

[No. 3941.]

LANCASTER ET AL. V. COALE.

1. EVIDENCE—*Burden of Proof.* One who asserts title to a mining claim, by relocation, upon allegation of non-performance by the original locator of the annual labor required by the statute, has the burden of showing such non-performance. (496.)

2. WITNESS—*Competency.* In an adverse suit against the devisee of a decedent, the plaintiffs are not competent to testify in their own behalf. (Rev. Stat., sec. 7267, Laws 1911, c. 229, sec. 1.) (496, 497.)

3. MINING CLAIM—*Adverse Suit—Co-tenant Not Joined.* A stranger interposing an adverse claim will not be heard, in the action in support thereof, to object to the non-joinder of a co-tenant of the applicant for patent. (498, 499.)

Error to Fremont District Court. HON. LEE CHAMPION, Judge.

Mr. JOHN R. SMITH and Mr. H. B. WOODS. for plaintiffs in error.

Mr. J. G. SCHWEIGERT, for defendant in error.

MORGAN, J.

Error by plaintiffs below, to reverse a judgment on a verdict against them in an adverse suit, based upon their adverse against the application for a patent by the defendant, as the devisee of the Gem Lode mining claim from her son, who died February 26, 1906, devising the claim to her. The plaintiffs based their claim upon a subsequent location of the Lillie of the Valley Lode which included the valuable part of the Gem Lode. The legality of the original location of both claims is admitted. The issues arose concerning the annual labor, particularly for 1905, required to be done by the deceased, before his death, and by the devisee subsequent thereto, and prior to the location by the plaintiffs.

Plaintiffs assign error: (1) That the evidence did not warrant the verdict; (2), That the court erred in not

permitting plaintiffs to testify as to facts occurring prior to the death of the son; (3), That defendant's evidence failed because it disclosed that one Hanna owned an undivided half interest in the Gem Lode.

The defendant's evidence was, *prima facie,* sufficient on undisputed facts, and the burden was upon the plaintiffs as to the annual labor. In case of *Beals v. Cone,* 27 Colo., 473, 501, 62 Pac., 948, 83 Am. St., 232, it is said:

"It is not necessary to perform the annual labor except to protect the rights of the locator against parties seeking to initiate title to the same premises. As against such subsequent location, a *prima facie* case is made on the part of the original locator by showing a valid location. *Hammer v. Garfield Co.,* 130 U. S., 291, 32 L. Ed., 964, 2 Sup. Ct., 548. * * * After a valid location, the title thus acquired remains so, whether the annual assessment work is performed or not, until forfeited or abandoned. *Renshaw v. Switzer,* 15 Min. Rep., 345, 6 Mon., 464, 13 Pac., 127. So that a party seeking to initiate a claim to mining premises already legally located must prove that the annual labor thereon has not been performed, in order to establish that the ground so located is subject to location."

The evidence on such issue was quite conflicting, and the jury must have found for the defendant thereupon, and the verdict will have to stand.

It was not error for the lower court to reject the testimony of the plaintiffs, themselves, because they were excluded by the terms of the statute; the defendant was defending as the devisee of her son, within the meaning of the statute, the pertinent parts of which are as follows:

"No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of an idiot, lunatic or distracted person, or as the executor or ad-

ministrator, heir, legatee or devisee of any deceased person."

This statute is followed by six exceptions, none of which can be held to include these plaintiffs. To permit them to testify would be either to create another exception, or to hold that the defendant was not defending as the devisee of a deceased person. It is contended that she is not so defending, but in her own personal capacity and under her own personal rights. But her rights, as she asserts them, depend upon the devise to her by her son; otherwise, she could not rely upon her preferential rights under the statutes of the United States, but would be required to locate the claim the same as any other person, being as she could not claim by any other right derived from her son, the owner thereof at the time of his death. He devised the claim to her, as a part, or the whole, of his estate; it is a part of his estate that is involved, and her rights to it, as devisee, and not otherwise; therefore it cannot be said that she was defending in any other way than as a devisee; she applied for a patent, as devisee, and she states in her answer that she defends as devisee; and in her evidence she relies upon such right alone; consequently she had the right, by virtue of the statute, aforesaid, to exclude the testimony of the plaintiffs, as witnesses in their own behalf, as to facts occurring prior to the death of her deceased devisor.

3. It is next contended that it appeared from the defendant's evidence that one Hanna was the owner of an undivided half interest in the claim, the Gem Lode, for which defendant applied for a patent. In proving her right to a patent to the Gem Lode, defendant introduced evidence to show the location and compliance with the law, on the part of her son, prior to his death, also what was done in compliance therewith after his death; and in proving his right to the ownership of the claim at the time of his death, she introduced evidence of advertisement notices, etc., "advertising out," Hanna, for not contributing his part of the necessary expense of annual labor on the claim, so as to show

her son's right to Hanna's undivided half interest therein. These advertisement notices were proved by affidavits of the publisher, as having been done at the instance of the son in the year 1905, the year prior to his death; but it is contended that her son did not make any affidavit that Hanna did not pay up his part of such expenses. Defendant then introduced an affidavit of the administrator to that effect, which was objected to, but admitted. The defendant contended at the trial that it was even unnecessary to go any further, because no adverse claim had been filed in the land office by Hanna, and that plaintiffs could not raise the question.

The issue in this case is whether either party is entitled to a patent under the laws of the United States and the State of Colorado. *Manning v. Strehlow*, 11 Colo., 451, 18 Pac., 625; *Marshall S. M. Co. v. Kirtley*, 12 Colo., 410, 21 Pac., 492. In the latter case the court said, after quoting sections of the United States Statutes providing the necessary steps to be taken by an applicant for mineral land:

"The issuance of a patent to the applicant cannot be stayed by reason of some one else claiming a better right to the possession of the premises, unless the person making such claim files the same against the claim made by the applicant.

An action brought in support of such adverse claim must be based upon the rights asserted in such claim, for the reason that it must be conclusively assumed that no adverse claim exists except such as have been filed."

Now, if Hanna had filed no adverse claim in the land office against the application of the defendant, it seems from the foregoing authority, that it should be conclusively assumed that he made no claim at all, and that the government, upon the proof made, would have issued the patent to the defendant, so far as Hanna's rights are concerned; and as the right to a patent from the United States is the issue here, and the purpose of the suit, then, evidence suffi-

cient to satisfy the requirements of the statutes, and entitle the defendant to a patent, she having the preferential right as to these plaintiffs, by reason of the prior location under which she claims and the devise to her by her son, would be evidence sufficient to sustain the verdict and judgment, so far as the rights of all the parties are concerned. *Marshall S. M. Co. v. Kirtley, supra; Becker v. Pugh,* 17 Colo., 243, 247, 29 Pac., 173, 174. In the latter case the court, having under consideration the advertisement against a co-owner and the objection to the same as being irregular or insufficient, the court saod:

"We do not think the appellants are in a position to raise this question. If the service was insufficient, Evans alone can complain of such insufficiency, and he is not before the court."

In the present case Hanna was not before the court and the rule so announced would seem quite applicable here.

The judgment is therefore affirmed.

Decided July 23, A. D. 1915. Rehearing denied July 28, A. D. 1915.

[No. 4175.]

COOPER V. GOLDEN, RALSTON CREEK & CHURCH DITCH CO.

1. WRIT OF ERROR—*Scire Facias—Limitation.* Where the *sci fa.* to hear errors is not issued until after the lapse of three years from the rendition of the judgment complained of, the writ of error must be dismissed. (500.)
2. WAIVER—*Special Appearance—Receipt for Abstract.* An appearance only for the purpose of moving to dismiss writ of error is no waiver of the *sci. fa.* (500.)

Nor is defendant's receipt of a copy of the abstract and brief. (500.)

Error to Denver District Court. HON GREELEY W. WHITFORD, Judge.

Mr. JOHN HIPP and Mr. F. T. JOHNSON, for plaintiff in error.

Messrs. SMITH, BROCK & FERGUSON and Mr. JOHN P. AKOLT, for defendant in error.

KING, J., rendered the opinion of the court.

June 16, 1914, the transcript of record, together with assignments of error, was filed in the Supreme Court, upon a judgment of the court below rendered November 7, 1911. Plaintiff in error filed his abstract of the record July 1, 1914, and on the same date copies thereof were served on the attorneys of record in the court below. Writ of error issued and was filed in accordance with the Supreme Court rule. Brief of the plaintiff in error was also filed July 1, 1914. No *scire facias* or summons hear errors issued until November 11, 1914, more than three years after the rendition of the judgment.

Upon the foregoing statement of facts the motion of defendant in error to dismiss the writ of error must be granted. Issuance of the *scire facias* was not waived by acknowledgment of receipt of the abstract of record and briefs, nor did the appearance of defendant in error, for the purpose only of making the motion to dismiss the writ, constitute such an appearance as would operate as a waiver. *McVicker v. Rouse*, 44 Colo., 255, 98 Pac., 807; *Brady v. People*, 45 Colo., 364, 101 Pac., 340; *Rudolph v. Rudolph*, 50 Colo., 243, 114 Pac., 977; *Chittenden v. Hill*, 55 Colo., 65, 132 Pac., 66.

Writ of error dismissed.

[No. 4046.]

COUNTY OF GUNNISON ET AL. v. DAVIS.

1. COUNTY COMMISSIONERS—*Powers.* Within the scope of their powers the Board of County Commissioners are supreme. They cannot be superseded, nor can their acts be judicially controlled or reviewed, except for an excess of jurisdiction or abuse of discretion. (506, 507.)

2. —— *Implied Powers.* The Board of County Commissioners possess such implied powers as are reasonably necessary to the efficient exercise of those powers and duties which are conferred and imposed upon them by the express words of the statute. Where a specific duty is declared the power to employ such agencies as are reasonably necessary to effectually perform that duty is granted by implication, unless by statute the board is expressly limited to specific means and agencies. (503.)

3. —— *Duties Compulsory.* The board cannot shift its powers to another, nor evade responsibility for its declared duties. (505.)

4. —— *Audit of Public Accounts.* The board being expressly charged with the duty of auditing, correcting and adjusting the accounts of county officers, and not being limited to any specific means or agencies, have implied power to employ an accountant to make the audit. (504.)

The power is not taken away by the Public Examiner's act (Laws 1909, c. 192, Mills Stat., sec. 131.) (505.)

The board have no control of the public examiner, no authority to direct an audit by him of the books of a county officer, and is not charged with notice of his report when made. (505.)

5. —— *Necessity for Expert Audit.* That an examination of the books of the treasurer has been made by a committee appointed by the District Court, and of the accounts of other officers, by he Public Examiner, is no ground to deny the power of the County Commissioners. Where it appears that no audit has been made by an expert, for many years, that the report of the Public Examiner was incomplete and unintelligible, that the Treasurer and Recorder had refused to allow an examination of their books, and that the tax-payer seeking to restrain the examination is a near relative of one of the officers, *held* to sufficiently evidence the advisability of an expert examination, even if any evidence, beyond the action of the board, were necessary. (506.)

6. EVIDENCE—*Judicial Notice,* taken, that in most counties, substantial sums should remain to the credit of the General Fund. (503.)

And that county officers are not always competent or faithful, and that some are guilty of speculation and embezzlement. (504.)

And that County Commissioners are not generally expert accountants. (504.)

7. COUNTIES—*Contingent Fund.* The expense of an examination of the books of the county officers, not contemplated at the date of the annual appropriation, may properly be discharged from the Contingent Fund. (506.)

Error to Gunnison District Court. HON. THOMAS J. BLACK, Judge.

MR. E. M. NOURSE, MESSRS. CRUMP & ALLEN, MR. E. J. BOUGHTON, for plaintiff in error.

MESSRS. SAPP & NASH, for defendant in error.

Per Curiam.

February 5, 1913, the Board of County Commissioners of Gunnison county employed Harry E. Mulnix, plaintiff in error, as an expert, to audit the books and accounts of certain county officers, the audit to include the years 1907 to 1912, inclusive, at an agreed compensation of $299.75 for each of said years. When Mulnix, with his assistants, attempted to make such examination and audit, the county treasurer and the clerk and recorder refused to allow the examination of their books and accounts, alleging as a reason for refusal that suit had been commenced to enjoin the execution of the contract. About that time the defendant in error instituted this proceeding, seeking to restrain he said board and Mulnix from performing the contract. A temporary writ of injunction was issued, and on final hearing was made permanent. Defendants are here with their writ of error.

The principal question involved is whether or not the Board of County Commissioners has authority in law, at the expense of the public, to employ a person to audit the books and accounts of the several county officers. Incidentally, and subordinate thereto, are other questions which will be discussed and disposed of.

1. The Board of County Commissioners possesses such powers as are expressly conferred upon it by the contitution and statutes, and in addition thereto such implied powers as are reasonably necessary to the efficient execution of its

express powers and duties. *Roberts v. The People,* 9 Colo. 458, 13 Pac. 630; *Chase v. Boulder County,* 37 Colo. 268, 271, 86 Pac., 1011, 11 Ann. Cas., 483; *Robbins v. County Commissioners,* 50 Colo. 610, 615, 115 Pac. 526.

We entertain no doubt that when a specific duty is by statute imposed on the board, the power to employ such agencies as are reasonably necessary to effectually perform that duty is granted by implication, unless by statute the board is limited to certain means and agencies, by which such duty is to be performed or power exercised. "The county commissioners represent the county, and have charge of its property and the management of its business concerns. They are neecssarily vested with reasonable discretion in the administration of county affairs." *Roberts v. The People, supra,* at page 472. It is expressly empowered to make all contracts and do all other acts necessary to the exercise of its corporate and administrative poewrs. Sec. 1177, sec. 1179, sec. 1204, R. S. '08; sec. 1288, sec. 1290, sec. 1313, M. A. S. '12. It is expressly charged with the duty of auditing the accounts of county officers, and correcting and adjusting the same. Sec. 2553, R. S. '08; sec. 2911, M. A. S. '12. The purpose and vital importance of an efficient audit is manifest from the statutory requirement that all prescribed fees shall be collected in advance by county officers, and when collected shall be paid to the county treasurer, and that any balance left to the credit of the several funds in any year, after the salaries and compensation provided for shall have been paid therefrom, shall be placed to the credit of the general county fund. The statute attaches severe penalties to the failure of such officers to pay over such fees. Sec. 2554, R. S. '08; sec. 2912, M. A. S. '12. It is common knowledge that in most counties of the state substantial sums should remain to the credit of the general county fund, and serve to relieve the heavy burden of taxation, if the official duty to charge, collect and account for the statutory fees, and economically administer the offices of the county, is faith-

fully performed. That county officers charged with the collection, safe keeping and disbursement of public funds are not always competent, economical and faithful, but sometimes commit gross erors, through incompetency or carelessness, sometimes are extravagant and unfaithful in accounting, and that some are even given to peculation and embezzlement, is also common knowledge. Not many of the powers conferred, or duties imposed, on the board, are paramount in importance to that of its supervision over the accounts of such officers. When it is known that such accounts will be effecually and frequently examined, and publicity given to the result, that knowledge will have a strong tendency to neutralize the temptation to peculation, and to encourage economy, accuracy and honesty, in the discharge of official duty with respect to public funds, as well as to allay unjust suspicion.

It is also common knowledge that county commissioners are not generally expert accountants, and may not be able to make an expert or efficient audit of such accounts. The board is not limited by the statute to any specific means or agencies for making such audit. We conclude, therefore, that the board had the implied power to employ said accountant. Statutes similar to those of this state, relating to the matters under consideration, were construed in *Harris v. Gibbins*, 114 Cal. 418, 46 Pac. 292, and *Prothero v. Board of Com'rs*, 22 Idaho 598, 127 Pac. 175, and in both cases it was held that the board had the authority to contract for an expert audit. In the case first cited the court said:

"The County Government Act requires many things of the supervisors which they could not wholly accomplish personaly, or do manually with their own hands. It is difficult to conceive how a board of supervisors in its capacity as a body corporate and politic could expert books, or be an expert accountant, and yet the experting of books seems to be necessary to that supervision of county officers which the law expressly imposes upon such board. Power to accom-

plish a certain result, which evidently cannot be accomplished by the person or body to whom the power is granted without the employment of other agencies, includes the implied power to employ such agencies; and in such case, when the law does not prescribe the means by which the result is to be accomplished, any reasonable and suitable means may be adopted."

2. Defendant in error contends that, even though the power to enter into the contract in question may have existed expressly or impliedly, prior to the Public Examiners Act (Chapter 192, Session Laws 1909, sec. 131 M. A. S.), nevertheless such power was repealed by that act. With that contention we do not agree. We find no evidence of such intent on the part of the General Assembly. Repeal by implication is not favored in law, and there is no express repeal in the act. No reason is shown, and we think none exists, for holding the provisions of that act to be inconsistent with the exercise by the Board of County Commissioners of its power, or that necessarily relieves it of its duty to audit the accounts. The examination to be made by the public examiner is manifestly for the use of the state, as distinguished from the local county government; the expense thereof is paid by the state; the report is to be submitted to the governor, for transmission to the legislature, and made a matter of public record in the office of the auditor of state. No report is required to be made to, or filed in the office of, the Board of County Commissioners. It has no authority to direct the state examiner to audit the books of the county officers, or to require a report from such examiner. It is not expressly, nor do we think impliedly, bound by, or charged with, notice of such report when made; *Prothero v. Board of Com'rs, supra.* The board cannot shift or evade its responsibility for performance of its duties; within the scope of its powers it is supreme; in the exercise of its reasonable discretion, in the administration of county affairs, it cannot be superseded, nor can its acts be judicially

controlled or reviewed, except for abuse of discretion or excess of jurisdiction.

3. We find no support for the contention that no appropriation had been made out of which the expense contracted for could be paid. A sufficient amount appears to have been provided for in the contingent fund. It seems to be conceded that this expense was not specifically contemplated, nor the necessity for the audit foreseen or recognized, by the board, at the time the appropriation resolution and levy were made. We think the expense contracted for comes fairly within the purposes for which a contingent fund is created.

4. The point seems to have been raised that a necessity did not exist for the expert audit contracted for. That contention is based entirely upon the allegation of the complaint that the treasurer's books had been examined by a committee appointed by the District Court, and that an examination of the accounts of other officers had been made by the public examiner. That showing alone is not sufficient. It is affirmatively shown by the defendant board that no expert audit had been made of the accounts for the years 1907, 1908, 1911 and 1912, and it is further shown by affidavit on preliminary hearing, that the examination made by the Public Examiner for the years 1909 and 1910 was incomplete, unintelligible, and unsatisfactory to the board of commisisoners, but nevertheless the report was adverse to certain of the officers so examined, disclosed irregularities in their books and accounts, and recommended that the district attorney take official action against such officers. It is further shown that a large majority of the electors and taxpayers of said county demanded an examination of the books. These matters, if any proof of necessity, other than the action of the board in employing an expert accountant, thereby declaring that a necessity did exist, was required, made a sufficient showing, to completely overcome the mere allegation or admission that other examinations

had been made, which, in the opinion of the board, were perfunctory and unsatisfactory. *Prothero v. Board of Com'rs, supra.* It is axiomatic that competent and honest officials court inspection of their acts and accounts. The fact that the officials having charge of the public funds refused to permit an inspection by the board, and that the "taxpayer" plaintiff is a near relative of the treasurer, affords strong presumptive proof that an expert audit was advisable.

5. Without in any manner challenging the right or power of a court of equity to exercise juridiction, in a case of this kind, when appropriately invoked, we are persuaded that there is nothing appearing in this record which justified or authorized the court to substitute its discretion in the administration of county affairs for that of the board of county commisisoners, in which that discretion is vested by statute. The temporary writ of injunction was improvidently issued, and the judgment making it permanent, not being supported by the evidence, cannot be sustained.

We have examined all the cases cited, but find none of controlling effect, opposed to the conclusions we announce. The judgment is reversed, and the cause remanded with instructions to vacate the injunction and dismiss the proceeding, at the cost of the defendant in error.

Reversed and remanded.

[No. 4171.]

IDELSON ET AL. V. ROBINSON.

1. PLEADINGS—*Amendment—New Cause of Action.* Action by a land broker to recover commissions. The complaint alleged that defendant had agreed to pay as a commission, a specified sum. An amendment alleged that defendant agreed to pay "the regular commission, usual and customary." *Held,* not a new cause of action. (508.)

2. LAND BROKERS—*Several Employed—Liability of Principal.* Where the same lands are listed with several brokers, the land owner is liable for commissions only to the one who is the procuring cause of the sale; but the land owner must remain neutral, affording to each an equal opportunity. Failing in this duty, and discriminating in favor of one of the rival brokers, he may be made liable for double commissions. (509.)

Evidence examined and the land owner held liable to plaintiff, though he had paid commissions to another. (509, 510.)

3. —— *One Employing Broker to sell Land of which another is the Owner,* is liable for commissions if a sale is effected. (510.)

4. APPEAL AND ERROR—*Conflicting Evidence—Second Trial.* Verdict on conflicting evidence, upon a second trial, and judgment thereon. The court refused to disturb the result. (510.)

Error to the Denver District Court. HON. W. S. MORRIS, Judge.

Mr. L. F. CRAWFORD, for plaintiffs in error.

No appearance for defendant in error.

MORGAN, J.

Plaintiff had judgment on a verdict in his action for a commission on a sale of real estate. Defendants, plaintifs in error, rely upon but three of their assignments of error.

First, that the court erred in not striking the amended complaint from the files, on their motion that it was a departure from the original and stated a new cause of action, because the original was upon a special contract and agreement to pay a specified sum as a commisison, and the amended complaint was upon a *quantum meruit.* The amended complaint was practically the same as the original, merely changing the allegation of a specified sum, to "the regular commission usual and customary to be paid in the City and County of Denver, Colorado, on such sales." This did not state a new cause of action, and the motion was properly overruled.

Second, that it was error to refuse their instruction for a directed verdict, based upon the insufficiency of the evidence. The plaintiff made a *prima facie* case by testimony that tended to prove his authority to sell, and that he was the procuring cause of the sale that was made, it being stipulated that $412.50 was the regular commission alleged in the amended complaint. The defendants rely, almost exclusively, upon the testimony of the defendants, and the purchasers, that another agent consummated the sale and was the procuring cause thereof; and that, when real property is placed in the hands of rival agents, the seller is only liable to the one who consummates the sale, there being no exclusive agency. This is a true proposition of law, if the seller remains neutral as to the rival agents, and gives each of them an equal opportunity to bring the parties together and consummate the sale; and the court submitted to the jury this proposition in reasonably clear language, but the jury found for the plaintiff. There is evidence in the record upon which such finding can be based; the plaintiff testified that he brought from the purchasers, who purchased the property, to the defendants, an offer of the exact sum for which he was authorized to sell the property, and that the offer was refused because it was not enough on account of some expense that had been incurred in renewing, or raising, a loan on the property; the defendant to whom the offer was made admitted that plaintiff came to him and gave him the names of the purchasers, and that plaintiff told him they would pay the price for which he was authorized to sell, and that he then told the plaintiff he could not talk business with him as to these purchasers because they were the same as the other agent had been negotiating with for about six months. From this testimony on each side of the controversy, respectively, the jury could base a finding that the defendants were not neutral, but favored the other agent, giving him a better opportunity to consummate the sale, by refusing the offer made through the plaintiff and by refusing to talk

business with him as to the purchasers the other agent had been negotiating with. It appeared, furthermore, from the evidence of the defense, that the same day that plaintiff communicated the offer, the defendant, to whom the offer was made, saw the purchasers, and that the following Fri, day, just three days later, the sale was made by a deposit of $500; that the other agent was paid only $100 commission. The other agent did not testify, and it did not appear that he ever communicated any offer or other evidence of anything he had accomplished in his negotiations with the purchasers, except to talk to them about the purchase of it about the same number of times that the plaintiff did, and to be with the parties when the sale was made on the Friday, aforesaid. One of the purchasers corroborated the plaintiff as to the offer made by him to the plaintiff to be communicated to the defendants. All the defendants' evidence showed that the price paid was about $350 more than the amount offered, as aforesaid.

In view of the evidence, as aforesaid, and of the better opportunity of the jury to determine the facts, and not overlooking the fact, appearing in the evidence, that the case was tried at least twice in the lower court, and that a motion was finally overruled asking for a new trial, the verdict will not be disturbed.

Third, it is contended that the court erred in not directing a verdict for the defendant, Goodstein, because his wife was the co-owner with the other defendant, and Goodstein had no interest in the property. But the plaintiff testified that Goodstein told him that he was a partner of Idelson, his co-defendant, in the property; that he talked with Goodstein, first, about selling property for him, and that he sent him to Idelson, saying that Idelson transacted all the business concerning their property, and would give him the price, etc., and that whatever Idelson did he would "stand for;" that he told Idelson Goodstein had sent him, and that Idelson said Goodstein was his partner. Goodstein admitted

on the witness stand that "he might have sent plaintiff to Idelson;" and there is no evidence that plaintiff knew, before the sale was made, that Mrs. Goodstein was the owner of the undivided interest in the property, instead of her husband. From these facts, the jury had evidence before it upon which to base the verdict against Goodstein.

The judgment of the lower court is therefore affirmed.

[No. 4191.]

MILLER ET AL. V. O'BRIEN ET AL.

1. JUDGMENT—*Form of.* The docket of a Justice of the Peace after giving the title of the cause the issuance, service, and return of the summons, the appearance of the parties, and trial, proceeded as follows, "the court finds for plaintiff and gives judgment for plaintiff in the sum of $30.00 and costs." *Held* good in form. The omission to state the amount of the demand in the docket entry was held not fatal to the jurisdiction. (513, 514.)

2. —— *Of Inferior Court—Jurisdiction Presumed.* One assailing the judgment of a justice has the burden of proof as to the lack of jurisdiction. (515.)

Error to Denver District Court. HON. H. P. BURKE, Judge.

Mr. JOHN HIPP Mr. W. W. WHITE, for plaintiffs in error.

Mr. PHILO B. TOLLES, Mr. THOMAS D. COBBEY, for defendants in error.

HURLBUT, J., rendered the opinion of the court.

The amended complaint in this action was filed April 4, 1913, (the record nowhere showing when the suit was begun). The defendants in error were plaintiffs below, and there recovered judgment against defendants Hipp, Royer, Heck, Youd, Turner and Miller.

The suit is one in equity, to annul a certain judgment of a justice of the peace, rendered July 6, 1909, by Ed. R. Mor-

ris, then justice of the peace, in favor of John Hipp plaintiff, against Eliza A. O'Brien and George F. Bennett, defendants; and to secure a decree declaring void the sheriff's levy, sale, certificate of purchase of real property, and deed, founded upon said judgment; as well as to declare void sundry deeds and incumbrances affecting and transferring the title thereto subsequent to said sale.

It is admitted by the record that soon after November 1, 1908, plaintiff George F. Bennett became the owner of the premises in issue and held the legal title thereto at the time of said levy and sale; that on or about July 16, 1909, the sheriff levied on the property under execution founded upon said judgment, and thereafter sold the same at public auction to the judgment creditor John Hipp, on the 9th day of August, 1909, and issued to him a certificate of purchase for the land sold, and afterwards executed and delivered a sheriff's deed therefor.

It is admitted in the answer that on July 6, 1909, the judgment of the justice of the peace aforesaid was rendered. But it is alleged that it was never paid; that no appeal was ever taken therefrom; that under the provisions of sec. 3758, Revised Statutes, 1908, a transcript of said judgment was lodged with the clerk of the District Court within and for the City and County of Denver, and execution thereafter issued thereon, out of said District Court, and placed in the hands of the sheriff, who levied the same upon the property in issue and sold it at public sale to satisfy the judgment; and that defendant Miller deraigns his title to the premises in issue through sundry mesne conveyances from the sheriff's deed aforesaid, his deed therefor being dated August 4, 1910.

As one of their defenses defendants alleged that on December 14, 1910, the District Court of the City and County of Denver, in a cause therein pending, to-wit, No. 50075, wherein said Miller was plaintiff, and said O'Brien and Bennett were defendants, rendered judgment in favor of plain-

tiff, against defendants, for the possession of the disputed premises in issue here; that the same issues involved in that case were involved in the case at bar; and fully pleaded the judgmnt last referred to in bar of the present action, and as being *res judicata* concerning all issues raised and presented in the case at bar. This defense was put in issue by the replication, and plaintiffs contend there is no proof of this defense in the record.

A careful review of the bill of exceptions fails to disclose that the defense of *res judicata* was supported by any proper proof. Neither the judgment nor the pleadings in that case was offered in evidence for the purpose of establishing that plea. Something denominated "the files in case No. 50075" was offered for another purpose, but upon objection was not admitted. The so-called files were not identified. The judgment roll in that case was not admitted in evidence, nor is there anything to show that it was offered.

We will now consider the status of the judgment of Justice of the Peace Morris, and the rulings of the District Court relative thereto. The trial court found that due and legal service of summons was had on defendants in that case, but that no valid entry of said judgment had ever been made; and rendered judgment to the effect that the execution issued thereon out of the District Court, the levy and sale thereunder by the sheriff, the certificate of purchase executed by him, and all mesne conveyances, from said sheriff's deed down to and including the deed to Miller, for the contested premises, be cancelled and held for naught.

The record entry of said justice's proceedings and judgment reads as follows:

"Paid by the plaintiff $3.00. John Hipp vs. Eliza A. O'Brien and George F. Bennett. June 29th, 1909, summons issued and delivered to constable John F. Giles, returnable July 6th, 1909, at 2 o'clock p. m. June 29th, 1909, summons returned endorsed 'Due service by deliving a copy to Eliza A. O'Brien, defendant. Service on George F. Bennett, by

leaving a copy with Eliza A. O'Brien,' and signed by John F. Giles, Constable. July 6th, 1909, case comes on for trial; parties appearing. Testimony introduced, and the court after being fully advised in the premises, finds for the plaintiff, and gives judgment for the plaintiff in the sum of Thirty Dollars and costs. And it is hereby ordered that execution issue. Ed. R. Morris, J. P."

It is claimed by plaintiff that this entry in form is not a judgment, is not properly worded or signed, to constitute a judgment, and contains inherent defects rendering it void. While there are some authorities tending to support this contention, there is a strong line of authorities the other way. We are of the opinion that the said judgment contains sufficient necessary recitals to constitute a good judgment as to form. *Deadrick v. Harrington*, Book 7, Fed. Cases, No. 3694b; Freeman on Judgments, secs. 51-53 (4th ed.); I Black on Judgments, secs. 114, 115 (2nd ed.); *Parker v. Swan*, 1 Humph. (Tenn.), 80, 34 Am. Dec., 619; *Kase v. Best*, 15 Pa., 101, 53 Am. Dec., 573; *Overall v. Pero*, 7 Mich., 315; *Minkhart v. Hankler*, 19 Ill., 47; *Johnson v. Gillett*, 52 Ill., 358; *Vangeazel v. Hillyard*, 1 Houston (Del.), 515; *Flack v. Andrews*, 86 Ala., 393, 5 So., 452; *Alvord v. McGaughey*, 5 Colo., 244; *Hagerman v. Moore*, 2 Colo. App., 83, 29 Pac., 1014.

The further contention is made that the evidence affirmatively shows a lack of jurisdiction of the justice of the peace to render the judgment assailed. We do not agree with that contention. It is based entirely upon the record entry of the justice's proceedings hereinbefore set out, which fails to state the amount of the demand made by the plaintiff in that case. There is no evidence *aliunde* said record as to the amount of the demand. It is argued by plaintiff that, because the record is silent as to the amount of the demand, want of jurisdiction must be presumed, and the judgment for that reason be declared void. Such is the ruling in some of the states, but that question is not *res nova*

in this jurisdiction. In *Liss v. Wilcoxen*, 2 Colo., 85, it was held that if the transcript of the justice's docket is not sufficient of itself to establish the jurisdiction of the justice, and thereby the validity of the judgment, the omission may be supplemented by proof *aliunde*, which of course could not be done if the omission of itself rendered the judgment void for want of jurisdiction. In the instant case the burden of proof was upon the plaintiff to establish the invalidity of said judgment, and the mere silence of the docket entry, as to the amount of the demand, was not sufficient to support that burden of proof as to the lack of jurisdiction. The plaintiff was not seeking to enforce the judgment, but to defeat it. 23 Cyc., 994; *Eichhoff v. Eichhoff*, 107 Cal., 42, 40 Pac., 24, 48 Am. St., 110.

For the reasons given the judgment is reversed, and the cause remanded for further proceedings. The former opinion is withdrawn and this opinion substituted therefor.

Reversed and Remanded.

Decided July 6, A. D. 1915. Rehearing denied July 23, A. D. 1915.

[No. 4194.]

HOOVER ET. AL. V. JORDAN.

1. LIBEL—*Priviledged Communication.* If the occasion, the motive, and the cause are proper, and the communication made in good faith, malice is not implied, but must be proven by the person complaining. (517.)

The mere falsity of the defamatory matter is not sufficient to raise a presumption of malice. (518.)

Excessive or unnecessary publication, or employing the privileged occasion in bad faith, for any improper motive, tolls the privilege. (518.)

A communication by the patrons of a public school, directed to the School District Board, complaining of a female teacher, and characterizing her conduct as "immoral or improper" was *held* one of qualified privilege. (518, 519.)

The testimony showing some reason or excuse for the charges made, and the abscence of malice clearly appearing, it was *held* that the court should have directed a verdict for defendant. (521.)

2. —— *Burden of Proof.* The defendant has the burden of showing the priviledged character of the communication, and the plaintiff of showing circumstances which take it away. (518.)

3. —— *Excessive Publication.* The alleged libel was a communication by the patrons of a public school to the School District Board, impeaching the conduct of a teacher. It was shown to no one, other than patrons. At the meeting of the board to consider it, the subscribers to the petition were repuested to be, and were present;—also an attorney and a stenographer, not by the request or connivance of the petitioners. *Held* the petitioners were not responsible for the presence of the attorney or the stenographer. (520.)

4. —— *Justification Pleaded,* even though not supported by the evidence does not take away the privilege. (520.)

5. WORDS AND PHRASES—*Immoral or Improper.* Doubted if the phrase should be construed to impute unchastity, when applied to the conduct of a female. (522.)

6. JURORS—*Competency—Opinion.* A juror admitted having formed and expressed an opinion as to the merits of the action but declared his willingness and ability to put it aside and try the issue solely upon the evidence. The denial of a challenge for cause held not error. (522.)

Error to Sedgwick District Court. HON. H. P. BURKE, Judge.

MESSRS. ALLEN & WEBSTER, MESSRS. MCCONLEY & MCCONLEY, and MR. F. L. CARRICO, for plaintiffs in error.

MR. ROY T. JOHNSON and MESSRS. MUNSON & MUNSON, for defendant in error.

MORGAN, J.

The plaintiff, a female school teacher, sued the fourteen defendants, in the lower court, for libel, and had judgment on a verdict for $3,225. She based her action upon the following written petition, or request, signed by all the defendants, and thereafter turned over to the schoool board. The defendants were all residents of the district, and patrons of the school, and not members of the school board:

"We, the undersigned citizens of East Sedgwick School, request the removal of the teacher, Mary Jordan, from our schools, as her conduct is immoral, or improper, and we do not think she is a competent teacher, and has but little control over the school."

A meeting was called by the board, after the petition was turned over to it, to consider the matter of the petition, and the plaintiff was discharged, having taught one month, of the nine months, of the term for which she was employed. Ther was no proof that the plaintiff was unchaste, but considerable evidence of reprehensible conduct on her part, as well as lack of competency, and control over the school; and the undisputed evidence showed, conclusively, that the occasion was such as to place the petition, or request, within that class of publications, otherwise libelous, known as a "qualified privileged communication," distinguished from an ordinary libel, not privileged at all.

The court did not properly instruct the jury as to this distinction, after having refused, at the close of plaintiff's case, a motion for a directed verdict for the defendants, and after having refused proper instructions tendered by the defendants on the privileged character of the petition, and on the burden of proof as to malice in the case; and for these reasons the judgment must be reversed.

In the interest of society at large and public policy, generally, it is a good defense to an action for libel or slander, that the publication, or communication, is privileged, either absolute, or qualified. It is a right, or privilege, on the one side, and a sacrifice on the other, that every citizen has, or must make, for the benefit of the common welfare, and in the interest of organized society. Newell on Slander and Libel (2nd ed.), page 389; Odgers on Libel and Slander (5th Ed.), pages 227 *et seq.*

If the occasion, the motive, and the cause, be proper, the publication or communication, if made in good faith, does not imply malice, as in ordinary libel or slander; but

malice must be proved by the person claiming to have been defamed, and the mere falsity of the alleged defamatory matter is not sufficient. The question of privilege is for the court, and of a malice, for the jury. Newell, *supra*, 391; Odgers, *supra*, 229. If the plaintiff in any case where it has been determined that the communication was priviledged, either absolute or qualified, has not produced any evidence of malice, the court should direct a verdict for the defendant, even though it is conclusively shown that the matter in the communication was false. it is the occasion of the communication, and not the communication itself, that determines its character as to being privileged, either absolute, or qualified; although, the words used, to the excessive publication, unnecessary promulgation, may remove the privileged character of the communication. The burden is upon the plaintiff to show the latter, and upon the defendant to show that the occasion was privileged. *Denver P. W. Co. v. Holloway*, 34 Colo. 432, 83 Pac. 131, 3 L. R .A. (N. S.) 696, 114 Am. St. 171, 7 Ann. Cas. 840.

The plaintiff was a public school teacher, the defendants were patrons of the school and residents of the district; it was the duty, and therefore, the privilege, of the defendants, to request the removal of the teacher, and to present such request to the school board in writing, if they chose, and to state the grounds they had for such removal. School boards have the power to employ and discharge public school teachers, sec. 5925, R. S. 1908; to discharge for good cause shown, sec. 5990, *id.*, from which action an appeal is allowed, secs. 6000 to 6007, *id.* Odgers, *supra*, page 277, says: "Every communication made with a view to prevent some public abuse is privileged, if it be published only to persons who have jurisdiction to entertain the complaint, or some duty or interest in connection with it." Quoting from Fitzgerald, B., in Warren vs. M'Calden, 7 Ir. Rep. C. L. 288, he says: ' "If, without malice, I make a defamatory charge

which I *bona fide* believe to be true, against one whose conduct in the respect defamed has caused me injury, to one whose duty it is * * * to inquire into and redress such injury, the occasion is privileged; because I have an interest in the subject matter of my charge, and the person to whom I make the communication has, on hearing the communication, a duty to discharge in respect of it." He cites the case of *McIntyre vs. McBean*, 13 Up. Can. Q. B. 534, on the same proposition, in which "the plaintiff was a teacher in a district school; the inhabitants of the district prepared a memorial charging the plaintiff with drunkenness and immorality," and in which it was held that the publication was privileged. Newell, *supra*, 475, in discussing a qualified privilege, says it arises "Where the circumstances of the occasion cast upon the defendant the duty of making a communication to a certain other person to whom he makes it in the *bona fide* performance of such duty." He cites the case of *Weiman v. Maybie et al.*, 45 Mich. 484, 8 N. W. 71, 465, 40 Am. Rep. 477, saying: "Statements contained in an affidavit presented to a superintendent of schools for the purpose of preventing a teacher's license being granted to a particular person, charging such person with improper conduct, are privileged, and not actionable unless untrue and maliciously made." The same principle is distinctly stated in the case of *Decker vs. Gaylord*, 35 Hun. 584: "A resident of a school district is protected in communicating to the proper authorities anything he may honestly believe to be true respecting the conduct and moral character of the school teacher of his district, and although defamatory in character, the presumption is that the communication under said circumstances is made in good faith, and any liability therefor to the aggrieved is dependent upon the existence of actual malice, which must be proven by the aggrieved party." * * * "The falsity of the charge is not sufficient to raise the inference of malice." * * * "Nor is the alleged truth of the charge in the ansewr, by way of justification,

evidence of malicious purpose, although the charge be untrue." To the same effect are the cases of *Galligan vs. Kelly*, 31 N. Y. Supp., 561; *Finley vs. Steele*, 159 Mo. 299, 60 S. W., 108, 52 L. R. A. 852; *Coogler v. Rhodes*, 38 Fla., 240, 21 So. 109, 56 Am. St. R. 170; *Stewart vs. Hall*, 83 Ky. 375; *Denver P. W. Co. v. Holloway*, 34 Colo. 432, 83 Pac. 131, 3 L. R. A. (N. S.) 696, 114 Am. St. 171, 7 Ann. Cas. 840.

It is contended, on the other hand, that conceding the law as to qualified privileged communications, in this instance such privilege was removed by excessive publication and unnecessary promulgation; and that the pleading of the truth of the charge in the answer, together with the want of probable cause for the communication, request, or petition, was sufficient evidence of malice to justify the court in submitting the matter to the jury. There is no evidence, whatever, that the communication was shown to any one except patrons of the school before it was turned over to the school board. It is conceded that the secretary of the board requested that the request be presented to the board; and that a meeting was called by the board to consider the matter; that the meeting was held and the signers of the petition and the plaintiff were requested to be present. It conclusively appears that no one attended said meeting, at the instance of the defendants, except those invited. It seems that an attorney for the plaintiff, and a stenographer, attended the meeting, but not at the request or connivance of defendants. They could not be held responsible for the presence of these persons under the circumstances. *Newell, supra*, page 531. The pleading of the truth of the charge was not of itself evidence of malice, nor did it remove the qualified privilege from the communication. *Decker v. Gaylord, supra.* As to the contention that there was a want of "probable cause" for the publication, it is a sufficient answer to say that the use of this expression occurs quite frequently in the authorites, referring to the "recognized obligation or motive, legal, moral, or social, which may be fairly presumed

to have led to the publication, and therefore, *prima facie*, relieves it from that just implication from which the general rule of law is deduced;" and to further say, that the evidence in this case, as we gather it from the record, shows, clearly, the existence of such probable cause, and a course of conduct and censurable words and deeds on the part of the plaintiff sufficient to cause the defendants to honestly believe the truth of the charges made in the petition, and to give them a just cause, or excuse, for making them. *Newell, supra*, pages 391, 392, 393. The question to be determined is, Did the defendants employ the privileged occasion, in bad faith, to gratify or to further some indirect or malicious motive, or for some improper reason. If this be shown by the plaintiff, or if it appear from the evidence of the defendant, it is clear evidence of malice, and thus takes away from the communication its privileged character. *Newell, supra, pages* 392, 393. The complaint and the testimony of the plaintiff clearly established that the communication was a qualified privileged communication, and disclose that there was some reason and excuse for the charges made, and the testimony and all the evidence of the plaintiff fail utterly to show any malice on the part of defendants; the evidence of the defendants shows more clearly the same thing; and, if the defendants had moved for a directed verdict at the close of their case, the court should have sustained it. The verdict of the jury is attributed to certain very erroneous instructions given them, as shown by the foregoing authorities and the illustration as to the instructions, following:

The court told the jury in two separately numbered instructions that, the defendants having pleaded the truth of the charge of immorality, the burden of proof was upon them to prove that fact by a fair preponderance of the evidence, and if they have failed to do so, then the verdict should be for the plaintiff. The mere plea of truth of the charge did not authorize a verdict for the plaintiff in case the defendants failed to prove it. *Decker vs. Gaylord,*

supra. This is a correct rule in ordinary cases of libel or slander, but not in the case of a privileged communication, either qualified, or absolute. In such cases the burden is upon the plaintiff, assuming the falsity of the charge, to prove actual malice on the part of defendant, before a recovery can be had. *Denver P. W. Co. vs. Holloway,* and other cases, *supra.* The evidence of the plaintiff, herself, and especially that of the defendants, showed that the conduct of the plaintiff was improper, and, in the sense of *contra bonos mores,* immoral, as defined by Bouvier, and Words and Phrases, but all the evidence failed to show unchastity on plaintiff's part; and it is very doubtful if the communication in the use of the words *"immoral, or improper,"* should be construed to mean unchasity. Such use discloses a lack of maliciousness, especially by the use of the disjunctive conjunction "or." It does not require actual unchasity to unfit a teacher to teach school, or to authorize a discharge.

Strenuous objection is made by the plaintiffs in error as to the ruling of the court concerning the qualification of one of the jurors who tried the case, and one that was excused on peremptory challenge. Both of them stated they had an opinion, one an expressed opinion, and, while neither one of them should have been allowed to try the case, it is not believed the error was reversible, because both, after direct questioning by the court, signified a willingness and the power to lay aside such opinion and to try the case solely upon the evidence. It is only rare instances that jurors cannot be obtained who have neither formed nor expressed an opinion.

When the pleadings were filed in the case, it is very doubtful if counsel on either side fully considered the action as outside the usual action for ordinary libel, as the complaint alleges no malice or malicious purpose, and also shows on its face that the occasion of the communication was privileged, and the answer does not specifically plead that the occasion was privileged, nor that it was gotten up in good

faith. The only allegation in the complaint tending to a statement of malice is the statement that the defendants got up the petition "to injure the plaintiff;" and the only effort of the answer to plead good faith or rely upon the privileged character of the occasion of the petition is the statement that "the defendants had no desire to injure the plaintiff in any manner." Giving to both the complaint and the answer the benefit of all implications of law, it may be said that the complaint stated a cause of action, as against a general demurrer, and that the answer contained enough to show that the defendants acted in good faith, and had reasonable grounds for believing the truth of the matter stated in the petition, and were thus entitled to the benefit of the law as applied to qualified privileged communications.

It is concluded, however, that the evidence of the plaintiff failed entirely to show any malice or malicious purpose on the part of defendants, and that the evidence of the defendants very clearly and conclusively established good faith on their part, as well as the entire absence of malice, and a reasonable and probable cause and excuse for the charges made; so concluding, the judgment is reversed, and the lower court instructed to dismiss the action.

Reversed with instructions.

[No. 4195.]

FIRST NATIONAL BANK OF GRANADA V. MARTIN.

PRINCIPAL AND AGENT—*How Far Principal Affected by Knowledge of the Agent.* The principal is not affected by the knowledge of the agent in a matter in which he acts entirely for himself. (532.)

Defendant dealing with the cashier of a bank, in a matter in which he was acting entirely for himself, as defendant knew, executed, at the cashier's request, a promissory note to the bank. The discount committee of the bank, being informed by the cashier that he had taken the note upon the sale of property accepted it, and the cashier obtained the money thereon. *Held* that the cashier's knowledge of the transaction was not to be imputed to the bank. (531, 532.)

Error to Prowers District Court. HON. A. WATSON MCHENDRIE, Judge.

MESSRS. MERILL & M'CARTY and MR. C. E. SNYDER, for plaintiff in error.

No appearance for defendant in error.

BELL, J.

The First National Bank of Granada, plaintiff in error and plaintiff below, hereinafter called plaintiff, instituted this action against A. P. Martin, defendant in error, and defendant below, hereinafter called defendant, to recover of him the sum of $1,555.22, with interest, the amount of two promissory notes, dated Dec. 12, 1911, signed by him, and payable 6 months after the date thereof to its order.

A defense of no consideration was interposed, and upon trial to the court with a jury, a verdict was returned in favor of defendant, and judgment was entered accordingly.

The answer, for a first defense, contains a general denial, and for a second defense, which, with the exception of the first paragraph thereof, is denied by replication, alleges as follows:

"That at and for a long time prior to the 12th day of December, 1911, one J. L. Mayfield was an officer and cashier of the First National Bank of Granada, Colorado, the plaintiff in this suit; that at and for a long time prior to said above mentioned date the defendant herein was the agent of said Mayfield, duly selected and constituted by him for the purpose of disposing of certain real estate, either by sale or exchange, then owned by said Mayfield in Colorado Springs, Colorado City, and the immediate vicinity thereof, in El Paso county, Colorado, and that defendant then resided in said City of Colorado Springs.

"That for some time immediately preceding and at said above mentioned date, negotiations were about to be consummated by defendant or agent for said Mayfield for the sale of certain property so owned as aforesaid, but on account of delays incident to the final closing, or anticipated closing, of a deal wherein the said Mayfield, if the consideration therefor was paid, would receive the sum of approximately $1,600, the said Mayfield, on or about December 12th, 1911, came to Colorado Springs and informed the defendant that he could not await the closing of any real estate deal; that he wanted the use of the money he was to receive therefrom at once, and said Mayfield then informed this defendant that he had arranged with plaintiff, said First National Bank of Granada, of which he was the cashier, that if defendant would execute and deliver to Mayfield a note payable in form to said bank, as payee, that he, the said Mayfield, as its cashier, had arranged with said bank that said obligation was to be taken by it as the obligation of Mayfield, and that he would pay and become personally responsible for the payment of said note upon its maturity, and that said bank agreed to take said note, not as the obligation of this defendant, but as the obligation of Mayfield, and would look to him solely for the payment of the same in consideration of the said Mayfield having agreed with said bank to turn over to it or apply towards the pay-

ment thereof all or any portion of the proceeds from the sale of the property so belonging as aforesaid to the said Mayfield; that said Mayfield further represented and stated to defendant at said time that on account of being cashier of said bank, it was not allowable under the law for said bank to loan money to its officers on unsecured obligations, and that he had arranged with his said bank that as a matter of form the notes would have to be made and signed in the manner suggested by him, and that upon delivery to the bank by the said Mayfield, the latter would withdraw the money thereon. That defendant, upon such information, and in consideration of the representations so made as aforesaid, agreed to sign the said notes; whereupon the said Mayfield suggested making the same in two different notes, and he then and there, and on the date aforesaid, drew up the two promissory notes, as set forth in the plaintiff's complaint, and upon the said representations so made as aforesaid by said Mayfield to defendant, and in reliance upon the same, defendant was induced to and thereupon did sign and deliver to the said Mayfield the aforesaid notes; that but for said representations so made by Mayfield, this defendant would not have signed the said notes.

"Plaintiff further alleges that he received no consideration, either money or thing of value in any manner or form for the signing of the said notes, and that in no manner or form did he in any way deal directly with or have negotiations with the said plaintiff, save and except as above recited; that no consideration was ever paid to or received by this defendant for the signing of said notes, either from the said bank or any one in its behalf, or from the said Mayfield, or any one in his behalf, or at all. That said Mayfield was the agent of and as its cashier acted for the said bank, in all aforesaid negotiations, and as such had full authority to transact the business of said bank, and the said bank, the plaintiff herein, received the said notes from the said Mayfield with knowledge of the manner, as aforesaid, in

which the same had been procured, and with the understanding and agreement, as aforesaid, with its said agent and cashier, that said notes were received by it as the obligation of and that it would look solely to the said Mayfield for the payment thereof, and not to this defendant, and that it did not take said notes as the obligations of the defendant, well knowing that this defendant had received no consideration whatever for the signing of the same.

Much evidence in respect to the real estate operations between Mayfield and defendant was introduced by the parties to the action, which merely raised an issue as to whether or not a certain deed made and delivered by Mayfield and his wife to defendant, for a certain property on Pike's Peak avenue, Colorado Springs, constituted, under the attending circumstances of the transaction, a good, valid and effectual conveyance to defendant of the property therein described, and operated as a good and valid consideration for the giving of the original note, of which those in suit are renewals. This evidence does not assist in a proper determination of the case, except to show the transaction out of which the notes sued upon originated, and further consideration of it need not be given, as the principal and controlling question for review is, whether or not the plaintiff bank is bound by the knowledge had by Mayfield, its cashier, of the facts attending the making and accepting of the original note, from which the action arises.

It appears that in the course of the real estate dealings between Mayfield and defendant, a deed to the Pike's Peak property hereinbefore mentioned was executed and delivered to defendant, and it was understood between them that this property was to realize for Mayfield the sum of $1,250.00. As hereinbefore stated, it is a disputed question, which need not be decided, as to whether or not this deed was intended and accepted as an actual and absolute conveyance of said property to defendant, for the sum of $1,250.00 above mentioned. Defendant denied at the trial that it was so intended

or accepted, but admitted that, some time after the deed had been given, he excuted a note for the amount, with interest, which together amounted to the sum of $1,400.00. This note was made payable to Mayfield, and accepted from him for discount by the plaintiff bank, of which he was then cashier. As the note matured, it was renewed from time to time by defendant giving a note on each occasion for the full amount of the previous one, with the interest due thereon, payable directly to the plaintiff. Concerning the original note and the facts attending the making thereof, defendant's testimony is abstracted as follows:

"Q. Now, Mr. Martin, I wish you would tell the jury just what the circumstances were and how you came to sign this note for—I think it is fourteen hundred dollars, the first note, anyway? A. Mr. Mayfield wrote me in regard to the matter, and made the suggestion about the signing of the note so that he could use the money. Q. Why was the note fixed at the amount that it was, or about that amount? A. When Mr. Mayfield was at my office for the purpose, I suppose, of securing the note, he made the statement that he would like to have some money; he asked me the direct question with regard to how much I felt that we could realize out of this Pike's Peak avenue property. I told him, I says I think we can realize at least twelve hundred and fifty dollars, so as to allow me enough for my commission. I figured fifteen hundred, allowing me two hundred and fifty dollars commission, and the twelve hundred and fifty net. Q. Was there anything said by him to you about your buying it? A. Absolutely nothing; I wasn't purchasing property under any circumstances. Q. And in all subsequent deals after this, did you take it up with him as his agent? A. Everything was reported to him, every transaction and every deal. Q. Now, coming back to the note proposition, what was it he said to you with reference to his wanting money, and wanting you to make a note? A. He made the statement he had to have

the use of some money, and he asked me whether I would not sign the note to the bank so that he could have the use of the money until I turned that property. Q. Did he tell you how he could make use of the money by you signing the note? A. He told me he could use it in the bank, meaning, of course, he would have the use of the money. * * *. Q. What further, if any, discussion was there about this note? A. Just the understanding that was talked over in our conversation in my office; he would look after the note and take care of it, and with that understanding, and placing the same amount of confidence that he was trying to impose in me, I signed the note. Q. Now, when you signed that note, Mr. Martin, what did you receive for it? A. I received nothing. I never did receive anything. Q. To whom was that note made payable to,—Mr. Mayfield or the bank? A. I supposed to the First National Bank of Granada. I have no way of finding out. The first note and second note are still in my possession, but I couldn't find them. I could not locate the first and second notes; they were cancelled and returned. All the other notes were drawn direct to the First National Bank. Q. And when the time run in the note, after it matured, came due, what was done with it? A. I told Mr. Mayfield that the property has not been sold, and I have no way of getting it out of that property and it was up to him to take care of it, as he agreed to do. Q. What did he say about making another note? A. He finally persuaded me to make a new note, and I did. Q. What did you receive for the making of that new note? A. I received the cancellation of the old note, that was all. * * *. Q. And the second note, when that came due, what was done as to the payment of the principal and interest? A. It was signed under the same conditions. Q. Was there another note given? A. That is the last note, I think it was divided in two notes, one for one thousand dollars and one for five hundred and fifty some odd dollars, making it two separate notes."

Mayfield, as a witness for plaintiff, testified that the Pike's Peak avenue property was sold to defendant about August, 1908, and concerning the transaction he said:

"Mr. Martin says to me one day, there will be no trouble in getting your twelve hundred and fifty dollars out of the Pike's Peak avenue property, and if you don't mind I will take that myself and guarantee you that amount of money, providing you give me a right to go out and handle the property and get the money out of it, so I told him that would be all right, that is what I wanted for it, and I would give him a reasonable length of time. He was to pay me twelve hundred and fifty dollars, with interest at six per cent., commencing September 1st, 1908."

On May 18th, 1910, he wrote defendant, in part, as follows:

"Now go in and do what you want to and it will be O. K. I feel sure that some day I will get $1,250.00 and 6 per cent. interest from Sept. 1st, 1908. Now, Mr. Martin, why not just settle this by giving me a note for the amount with interest to Sept. 1st next and have it settled. I can put the note right in the bank here and use the money at once, and it will help me quite a little just now. If you think well of this sign and return the note I inclose, int. added in, and no more interest till due."

In conformity to the suggestion contained in this letter, the note was executed, and at divers times renewed, as hereinbefore stated, and on August 11th, 1911, when one of the renewals was about to mature, Mayfield sent the following letter to defendant:

"I inclose communication from Perkins, Morton & Co. for your reply, as I do not know whether we own this property or not.

"In this connection I desire to say the note of yours we hold will be due Oct. 12th next, and our board has decided not to carry outside paper after that we have on hand matures. It will, therefore, be necessary to pay this note at

that time. Please keep this in mind and try to get the money out of the property as soon as you can, otherwise we will have to dig it some other way."

On October 16th, 1911, he again wrote him as follows:

"Replying to yours of the 9th inst., will say, there has never been a conversation or letter by or from me intimating that you would be relieved from the debt due the bank. It is true that I asked you to sign the note to the bank so I could have use of the money, and always supposed you would pay me. If you want to renew for six months I enclose a blank for that purpose. I leave tonight for Denver for the rest of the week, and unless the matter is taken care of on my return I certainly will take steps to collect."

After the receipt of those letters, defendant again renewed the note by executing those in suit.

Although it is shown that Mayfield's duty, as cashier of the bank, was to pass upon loans, to accept paper for the bank, and to make loans on notes, it nowhere appears that the knowledge that he possessed of the transaction in controversy was ever communicated by him or ahybody else to the bank as a corporate body. In fact, the very contrary appears, and is not disputed. When asked if the bank as a corporate body, its board of directors or discount board were ever advised by him or any other person as to the details of the transaction, he replied in the negagtive, and further testified that the discount board of the bank, at its regular meetings, passed upon all notes and discounts accepted and made by the bank; that the note in controversy was passed upon by it; and that he gave them no information about it, other than that it was one he had taken for the sale of property; and defendant, himself, admitted that he did not deal with the bank, except through Mayfield.

From the sworn allegations in defendant's answer, and the evidence as herein reviewed, it is apparent that defendant was aware of the fact that Mayfield, in securing the note for acceptance by the bank, was acting entirely for himself

and not for the bank in a matter which it was to his own interest to conceal. Under such circumstances, it cannot be held that Mayfield's knowledge of the facts of the transaction was imputed to the bank, for a bank is not chargeable with notice of matter which it is to the interest of the officer to conceal, or which was acquired by him while acting in his own behalf, or as the agent of another: 15 Cur. Law, 457, citing *First Nat. Bank v. Lowther-Kaufman Oil & Coal Co.*, 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511; *Lilly v. Hamilton Bank*, 178 Fed. 53, 102 C. C. A. 1, 29 L. R. A. (N. S.) 558; *State Bank of Moore v. Forsyth*, 41 Mont. 249, 108 Pac. 914, 28 L. R. A. (N. S.) 501; and *First Nat. Bank v. Northrup*, 82 Kan. 638, 109 Pac. 672, 136 Am. St. 119.

In 5 Cyc. 461, 463, it is said that "when an officer is individually interested in a note or other matter, the better opinion is that his knowledge is not to be imputed to the bank, since his interest is best served by concealing it," and, further, that "the knowledge of a bank director is not chargeable to his bank with respect to all discounts and other matters in which he is interested, for the presumption is that he will not communicate them, since his purpose would be best served by maintaining silence."

The case of *State Bank of Mooore v. Forsyth, supra,* is almost identical to the one at bar, and contains an elaborate review of authorities and a comprehensive discussion of all the questions presented by the pleadings and evidence under consideration herein. In view of the rules and principles of law as therein expressed, it must be held that the record before us fails to disclose any knowledge on the part of the bank of the facts attending the execution of the original note in controversy, or the subsequent renewals thereof, and that the trial court erred in denying plaintiff's motion for a directed verdict. Therefore, its judgment is hereby reversed, and the case remanded with instructions that judgment be entered for plaintiff, as prayed for.

Reversed and remanded.

[No. 4196.]

PEERY V. PEERY.

1. MARRIAGE—*Common Law—Evidence.* The evidence to establish a common law marriage must be clear, consistent and convincing, especially, where, to establish such marriage, will be to lay ground for the prosecution of either party for bigamy, or to invalidate a subsequent marriage in which all the requirements of the statute have been observed. (538, 539.)

2. —— *Reputation,* to establish a common law marriage must be general and uniform. (539.)

Action for divorce and alimony, plaintiff claiming as a common law wife. The evidence examined, and held insufficient to establish the alleged relation. (535-538.)

Error to Denver District Court. HON. JOHN H. DENISON, Judge.

MESSRS. HILLIARD & LILYARD, MR. J. R. ALPHIN, for plaintiff in error.

MR. H. A. CALVERT, for defendant in error.

CUNNINGHAM, P. J.

Defendant in error, to whom we shall hereafter refer as plaintiff, brought her action for divorce and alimony and had judgment. She admits that no marriage ceremony was ever performed or attempted, hence she relies entirely upon what is known as a common law marriage. The record discloses that the alleged agreement of the parties to become husband and wife took place, if at all, at a time when, by virtue of a statutory marriage, plaintiff was the wife of one John Gordon. Thereafter plaintiff obtained a divorce from Gordon, but no new contract was ever entered into between plaintiff and defendant subsequent to said divorce; this, plaintiff admitted. On cross-examination she was asked the following questions and made the following answers:

"Q After the decree of divorce [meaning her divorce from Gordon] was granted, on April 14th, 1910, state whether or not anything was said between you and Peery about intending to live together as before?

A. No, we lived together just the same.

Q. Was anything said about it?

A. No, sir."

Plaintiff attempted on trial to explain her conduct by saying that when she met the defendant she supposed that Gordon was dead, and that she had been so informed. Her testimony on this point, as on many others, was inconsistent and wholly unworthy of belief. The records of the County Court of Denver show that she brought the divorce action against Gordon, alleging desertion, non-support and cruelty, and in her affidavit for publication of summons in that cause she stated that she had made search for Gordon through various fraternal orders, and otherwise, without being able to locate him. Moreover, she admitted on the stand, in this case, that none of her family, except a brother who had died, knew that Gordon was dead. She appears not to have been estranged from her family, who resided in Iowa, and whom she visited at least twice during the period covered by her relations with Peery. She testified thtat Gordon was "just such a looking man as Peery." While visiting with her people in Iowa she wrote numerous letters to defendant, and always addressed him as J. D. Gordon (mailing her letters thus addressed to defendant's box number in Denver), and she signed her letters, where she signed her full name, as "Nora Gordon." She admitted that she desired her people to think that Peery was Gordon, and she so introduced him to a sister who once accompanied her from Iowa to Denver, and remained a few days in the latter city. Her explanation for this unusual conduct was that her folks were Catholics, and that Gordon was a Catholic, but that Peery was not a member of that church, and, apparently, she was unwilling

to have her relatives know that she had married a protestant. At least this was her sole explanation.

Prior to the institution of this action defendant had entered into a statutory marriage with another woman whom he had known from her childhood, and with whom he continued to live, and with whom he was living as husband at the date of the trial of this cause.

Aside from the unsatisfactory evidence that plaintiff and defendant had lived together as husband and wife, to which we shall presently allude, the only evidence of a contract of marriage between them was the testimony of the plaintiff herself—no third party being present when she claims same was entered into. Nor was there any direct evidence that defendant ever admitted having entered into such a contract. In his answer and on the trial he denied having done so.

Plaintiff's attempt to prove a contract of marriage by general reputation in the community in which she claims that she and defendant resided resulted in a compelte failure. For the purpose of establishing a marriage by general reputation plaintiff introduced but three witnesses, although she testified that she and defendant had lived together as husband and wife in three different rooming houses in the City of Denver. One of these witnesses was a child nine years of age at the date of the alleged transactions to which she testified; the second witness was a woman who ran various rooming houses in the City of Denver, in which plaintiff lived, while the third was a grocer with whom plaintiff traded for a short time, having her account charged in her name as Mrs. Peery. There was no evidence whatever that the defendant knew that plaintiff was running such an account, and no evidence that he paid the same. The grocer had never seen defendant, and knew nothing whatever concerning his relations with the plaintiff. The landlady referred to admitted that she had never had any introduction to the defendant, and had never spoken to him, but

she testified that she had seen him enter her house occasionally, usually (if not always) in the evening, and had heard him talking in plaintiff's room, but she gave no testimony indicating what defendant said on those occasions. The little girl may have spoken to defendant, though that does not clearly appear. She had seen him in plaintiff's room on two or more occasions, and had once heard him refer to the plaintiff as "mamma." The little girl had a mother and several older sisters, and an older brother, all of whom lived in the same house, and on a lot adjoining the premises where plaintiff claims defendant lived with her, as her husband, for several months. None of the older members of the little girl's family were called as witnesses, although all of them were living in Denver, the place of the trial, on the day of the trial. The trial occurred in February, 1914, three years after the time of the transactions concerning which the child testified. The rooming house where plaintiff claims she and defendant lived on the occasion of which the little girl and the landlady testified, was filled with roomers, yet none of these roomers were called as witnesses, although at least one of them was living in Denver at the time of the trial. No witnesses were called from two of the three rooming houses in which plaintiff testified that she had lived with the defendant as his wife.

None of the letters written by plaintiff to defendant, which were introduced in evidence, contained anything which indicated that she regarded herself as the wife of the defendant, while they contain much indicating that she did not so regard herself. She seems never to have addressed him as her husband; on the contrary, as we have already said, she addressed him as "Gordon." Some of these letters were written and mailed in Denver to defendant during the time plaintiff testifies that they were living together in said city as husband and wife. In these letters she usually, if not always, urged the defendant to come to see her, and upbraided him for not doing so. Plaintiff admitted that she

had received various letters from defendant when he was out of the city, and when she was out of the city, but she produced none of these letters, although she admitted that she had not destroyed them. She also testified that she had received letters from various friends living in Denver when she was visiting her family in Iowa, but she produced none of these letters.

The landlady, whom she called as a witness, had known her for many years prior to her alleged marriage to defendant, and testified positively that she knew plaintiff as "Nora Gordon" a year before the date of plaintiff's marriage to Gordon. She fixed the date with great precision and much certainty, and there is nothing in the record to contradict her testimony in this behalf, since the plaintiff admitted that she had known Gordon for eight years before she was married to him, although she knew none of his relatives.

Plaintiff complained to an officer of the Juvenile Court of Denver of defendant's conduct. Said complaint resulted in the arrest of defendant on the charge of failure to support his illegitimate child—the child of plaintiff. She consulted a firm of attorneys as to a damage suit against defendant, and they wrote to him saying that "Mrs. Nora Gordon has consulted with us in regard to your relations with her," etc. From this it would seem clear that she did not represent to this firm of attorneys whom she consulted that she was the wife of defendant or that her name was Peery.

While on the stand plaintiff stated that she had never been married prior to her marriage with Gordon, but later she admitted that Gordon was her second husband; that she was married in Nebraska to a man by the name of Guggenheimer before she married Gordon. According to her testimony both Guggenheimer and Gordon died shortly after her marriage to them, the former in less than a month and the latter in about three months.

So far as the evidence discloses, plaintiff and defendant were never seen together outside the four walls of the vari-

ous rooms which she rented and paid for, and but three witnesses at most, plaintiff included, saw them together at all. To no one did defendant ever introduce plaintiff as his wife, nor is there any evidence that she ever introduced him as her husband, and no witness was called who had ever known the defendant personally.

Defendant introduced two witnesses, husband and wife, who had known him for many years. Both of these witnesses testified that he roomed at their home during the period that plaintiff testified she and defendant were living elsewhere as husband and wife. There was nothing whatever to indicate that the testimony of these witnesses was not entirely credible. Indeed, one of them was not subjected to any cross-examination whatever. Defendant introduced a large number of receipts covering his room rent, which the woman where he roomed testified that she had written, signed and delivered to defendant in payment for his room rent. She further testified that she knew he occupied his room regularly, for she cared for the same.

There is nothing in the record disclosing the age of either the plaintiff or defendant, but the evidence clearly indicates that plaintiff was a woman of mature years, since she was married to Guggenheimer in the spring of 1907 and to Gordon a year later. According to her own testimony she knew Gordon at the time she was the wife of Guggenheimer, and according to the testimony of her chief witness, the landlady, she was known as "Nora Gordon" at the time she claims to have been the wife of Guggenheimer. Plaintiff's family appears to have lived all the time in Iowa, yet she admitted that she had lived in Denver for about ten years prior to the trial, or since about 1904. Plaintiff, the evidence shows, had traveled much; therefore, it cannot be inferred that she was a woman of tender years or one without experience.

We agree with the announcement made in the opinion, *In re Rossignot's Will* (Sur.), 112 N. Y. Supp., 353, that

"evidence to establish a common law marriage should be clear, consistent and convincing." Especially is this so where the result of establishing such marriage would lay the ground for a crimnal prosecution of either of the parties to the marriage for bigamy, and would invalidate a subsequent marriage wherein all of the statutory provisions had been observed.

It is manifest that plaintiff's claim of marriage to Peery rests entirely upon her own testimony and the testimony of her two witnesses with reference to general repute. Concerning the nature and character of evidence necessary to sustain the contention of general reputation, the following has been said:

"The general reputation in the community where the parties resided as to whether or not they are husband and wife is competent evidence as tending to prove marriage. It is in the nature of a verdict of the community upon their relations, arrived at from observing their conduct, their manner of life, their deportment toward each other and the community, and their declarations. It is the general impresion or belief created in the minds of the people from those things which constitutes the general reputation, which may be shown in evidence as tending to raise the presumption of marriage or the contrary. *To be of any value as evidence such reputation must be general and uniform.*" (Italics ours.)

Weidenhoft vs. Primm, 16 Wyo. 340, 94 Pac. 453. *In re Peterson's Estate*, 22 N. D. 480, 134 N. W. 751, it is said: "The repute, to have its fullest effect, should be uniform."

We have no doubt whatever that the record of this case wholly fails to support plaintiff's claim that a common law marriage existed between herself and defendant. Indeed, her own testimony, as we read it, would have justified the trial court in directing a verdict against her. The following cases from our own courts are in some respects appli-

cable and tend to support the conclusion at which we have arrived:

Henry vs. McNeal, 24 Colo. 456, 50 Pac. 37; *Taylor vs. Taylor,* 10 Colo. App. 303, 50 Pac. 1049; *Klipfel's Estate vs. Klipfel,* 41 Colo. 40, 92 Pac. 26, 124 Am. St. 96.

The judgment of the trial court is reversed, with instructions to enter a judgment dismissing the case.

Reversed with directions.

[No. 4199.]

PHILLIPS INVESTMENT COMPANY V. COLE ET AL.

1. WATER. RIGHTS—*Adjudication of Priorities—Single Stream. Semble.* That an adjudication may be had of the priorities of consumers from a single stream.

2. —— *Decree—Change of Use.* A consumer will not be heard to complain that in a decree adjudicating priorities another consumer is permitted to change the use from storage to direct use, where he is in no manner prejudiced by the change. (542.)

3. —— *Change of Point of Diversion—Statute Construed.* The statute regulating the proceeding for securing the right to change the point of diversion (Rev. Stat., secs. 3226-3229) applies only to the case of a water right already adjudicated. It is not error to permit a change of the point of diversion, in an original proceeding for the adjudication of the water rights upon a particular stream, all parties in interest being present, and no prejudice to those complaining being shown. (543.)

Error to Bent District Court. HON A. WATSON MCHENDRIE, Judge.

Mr. GRANBY HILLYER, for plaintiff in error.

Mr. D. B. KINKAID, for defendants in error.

KING, J., rendered the opinion of the court.

November 4, 1909, in a general adjudication of water rights, The Phillips Investment Company was awarded priority number one, in the waters of Graveyard Creek. Within four years thereafter, defendants in error brought this suit, in the nature of a proceeding in equity to determine their claim of priority of right to water from said creek for irrigation purposes, as permitted by section 3313, R. S. '08, section 3836, M. A. S. '12, making The Phillips Investment Company, and apparently all others on that creek, parties defendant. To review the decree awarding plaintiff priority over it, the plaintiff in error brings the cause to this court on error.

The points relied on as error are: (1) that although the water right proven by plaintiffs was for storage, the decree is for direct appropriation from the stream, for immediate use; (2) that a change of the point of diversion of their water rights was granted plaintiffs in this proceeding, without authority of law. Although not free from doubt, we thing the objections noted are not sufficient to justify reversal.

Graveyard Creek is the name of a prairie "draw" or ravine. It had no natural flow of water, except in times of flood, until about the year 1900. About that time water from seepage began to appear in the upper (i. e., northern), course of the ravine, due probably to the presence of irrigation canals crossing it or located in the vicinity thereof. In 1900, for the purpose of intercepting and appropriating this seepage water, K. E. Messenger threw a dam across the said creek, in section four, township twenty-two south, range forty-eight west, thereby creating a small reservoir, and made a ditch called the "Supply Ditch," extending from the dam about two miles to the north, both dam and ditch being constructed and used for the purpose of collecting and storing the seepage water as it accumulated, to be used, and which was used in part, for irrigation of land in section twenty-one, now owned by one of the plaintiffs. In this

proceeding the ditch built by Messenger, below the reservoir as well as above it, is named the "Supply Ditch." According to the finding and decree of the court, Messenger made an appropriation of three cubic feet of water per second of time, which he thereafter sold to plaintiff. From 1900 until 1906 the water used by Messenger was diverted from the creek near the north line of section sixteen, one and one-half miles below the reservoir, through a ditch herein called the "old ditch." In 1906 plaintiff constructed the "Cole and Bever Ditch," having its headgate on the creek about one-half mile south of the old ditch, and from that time until 1913, when prevented by plaintiff in error, the water purchased from Messenger was diverted through the Cole and Bever Ditch. This ditch of the Investment Company diverts its water from the creek two and one-half miles further down, and its priority dates from January 27, 1906, a short time before the Cole and Bever Ditch was made and used. Such other testimony as seems necessary will be noted in the opinion.

1. The evidence tends to show that from 1900 to 1906 practically all the water in the creek, whether stored or not, was used by Messenger. For that reason, under the peculiar facts of this case, surrounding the development and use of his water right, as the seepage increased, and prior to any right acquired or claim made by plaintiff in error, it is immaterial whether the water was first stored or detained in the reservoir, and thence taken to the land, or permitted to flow dierctly to the place of diversion and use. The change resulted in no greater draft on the waters of the stream, either in volume or time of use. The necessity, as well as advantage, of holding water in the reservoir while the seepage was first developing, so as to accumulate a volume or quantity sufficient for practical use, is obvious. Plaintiff in error is in no manner prejudiced by the alleged change from storage to diversion for immediate use; in fact the evidence shows that for a number of years the waters

flowed through the reservoir or dam without being stored and were so used by plaintiffs, without objection by plaintiff in error.

2. The contention that the court erred in granting to plaintiffs the right to divert water to which they are entitled, at the head of the Cole and Bever Ditch, instead of limiting them to a diversion at the head of the old ditch, is based on the claim, first, that a change of point of diversion may not be decreed except when prayed for in the special statutory proceeding for that purpose,—Chapter 124, Session Laws 1903; and second, that the change permitted in the instant case injuriously affects the rights of plaintiff in error.

We think the special act of 1903, prescribing the procedure for determining the right to change point of diversion, may not be successfully invoked by plaintiff in error to defeat this decree. That act, *ex vi termini,* seems to apply only to proposed changes in point of diversion of adjudicated water rights. All the decisions holding that said act provides an exclusive remedy for trying the right to change place of diversion refer to adjudicated rights, the place of diversion of which had been fixed by a prior decree. *Irrigation Co. v. Water S. & S. Co.,* 39 Colo., 469, 68 Pac., 781; *Fort Lyon Canal Co. v. Chew,* 33 Colo., 392, 397, 81 Pac., 37; *Fluke v. Ford,* 35 Colo. 113, 84 Pac. 569; *Farmers' Co. v. Wolf,* 23 Colo. App., 570, 131 Pac., 291. This proceeding constitutes an original adjudication of the water rights on Graveyard Creek, for, although plaintiff in error had obtained a decree, it was obtained without notice, and constituted no bar to the present proceeding. It appears that all parties that might be affected by the decree were before the court, and we know of no reason why the question of the diversion of the water rights at the point contended for, was not properly an issue that might and should be tried and settled. Under the facts of this case we find neither statute, judicial announcement, nor reason, which would compel or

justify a reversal because of the provision of the special act mentioned.

The record fails to sustain the contention that the rights of plaintiff in error have been, or will be, injuriously affected by permitting the diversion of plaintiffs' water rights at the head of the Cole and Bever Ditch. From the outlet of the Messenger reservoir, to the head of the old ditch, the creek bed and the ditch made and used by him to carry the water from the reservoir to the land irrigated thereby, are coincident. It is now urged by plaintiff in error that seepage in large quantities developed in the creek below the reservoir, not contemplated in the original Messenger system or claim, and that contention is supported by the evidence, but it is shown that all that water was used by Messenger in the irrigation of his land, at least to the extent of his decreed priority, for the every simple but conclusive reason that it could not get by the diversion dam. It is also urged that a substantial flow of seepage comes into the creek between the dam at the head of the old ditch, and the dam at the head of the Cole and Beaver Ditch, but the record here fails to sustain that contention. Moreover, the decree and the findings taken together limit the prior rights of defendants in error to the water right purchased by them from Messenger. It does not include any water developing or having its source in the creek below the diversion dam at the old ditch.

Perceiving no prejudicial error, the judgment will be affirmed.

Judgment affirmed.

[No. 4025.]

MILLIKEN V. NEIL.

1. APPEAL AND ERROR—*Finding on Conflicting Evidence,* will not be disturbed. (547.)

2. VENDOR AND VENDEE—*Waiver of Condition.* An agreement between plaintiff and defendant for the exchange of lands, recited that the lands of defendant were subject to a mortgage, of which $2,000 matured in 1912. Plaintiff was however distinctly advised, before concluding the exchange, that more than $2,000 of this mortgage would mature in 1910, and with this knowledge he accepted a conveyance from defendant and executed a conveyance of his own land to defendant. *Held* that he had waived this provision of the agreement and was not entitled to rescision. (546, 547.)

Error to Teller District Court. HON W. S. MORRIS, Judge.

Mr. JOHN R. SMITH, Mr. H. B. WOODS, for plaintiff in error.

No appearance for defendant in error.

HURLBUT, J., rendered the opinion of the court.

This action was begun June 13, 1910, by Wm. B. Milliken, plaintiff in error (plaintiff below), against Gilbert R. Neil (defendant). The case was tried to the court without a jury, and judgment rendered in favor of defendant.

This action grows out of a written contract dated March 1, 1910, executed by the respective parties to the action. It appears from the pleadings and evidence that plaintiff Milliken owned certain lots in the town of Cripple Creek, and defendant Neil a 10-acre tract of orchard land in the vicinity of Grand Junction; that they agreed to make exchange of their properties, which was done; that some weeks thereafter plaintiff brought this suit to rescind the contract, and secure a reconveyance of the property which he had deeded to defendant thereunder; that the written contract recited there was a mortgage (which plaintiff assumed), of $3,000

upon defendant's ten-acre tract, $2,000 of which was payable in 1912 and the remainder in 1913; and that before the contract was finally consummated plaintiff was informed and had knowledge that the $2,000 was in fact due and payable about May 31, 1910.

Both from the record and plaintiff's brief, we are persuaded that but one controlling question need be considered by this court, in order to dispose of this appeal, and that is: Did plaintiff Milliken waive the condition in the contract, to the effect that $2,000 of the $3,000 mortgage indebtedness on defendant Neil's ten-acre tract, became due and payable in 1912, by delivering deed of his property to Neil, accepting Neil's deed to the ten-acre tract, and taking possession thereof, after he had received full knowledge of the real date of maturity of said $2,000?

There is ample documentary evidence and testimony in the record to sustain the judgment upon the theory of waiver, as well as upon the theory of plaintiff's ratification of all acts on the part of his attorney Mr. McMullin, and attorney in fact G. M. Milliken. Issues upon both questions were formed by the pleadings. The following is in brief some of the evidence upon those points:

On March 14, 1910, plaintiff, from Tonopah, Nevada, mailed a letter (enclosing contract), to his attorney McMullin, reciting therein that he had wired his (plaintiff's) brother to prepare and send deeds for plaintiff to execute, to Neil; also requesting McMullin to assist in examining title, and making out such deeds, and to take charge of the Neil land. On the same date, the law firm of McMullin & Sternberg mailed a letter from Grand Junction to plaintiff at Denver, therein passing favorably on the title to the Neil land, and specifically notifying him that $2,075 of the mortgage indebtedness would become payable on *May* 31, 1910. April 9, 1910, McMullin mailed a letter from Grand Junction to plaintiff at Denver, stating that he had that day closed the deal with Neil, and recorded the deed from him to

plaintiff, and also stating again that the $2,075 of the mortgage indebtedness would be due about June 1, 1910. In answer to this letter, plaintiff on April 17, 1910, wrote McMullin from Denver stating "I approve of all you have done, and I thank you for your trouble;" also empowering him to make and sign a lease to the man then in possession of the Neil tract. Between April 17th and May 13th, 1910, a number of other letters passed between plaintiff and McMullin, pertaining to the ten-acre tract, its crop conditions the acts and doings of the tenant, etc., but containing therein no suggestion on the part of plaintiff that he was dissatisfied with the things done for him under the contract by his brother and McMullin, or that the contract had not been complied with on Neil's part. In a letter of May 13, 1910, we find the first evidence of complaint on plaintiff's part that the contract had been violated and that his representatives had failed to enforce a literal complaince with the contract on Neil's part.

In addition to the foregoing mentioned letters, witnesses for the respective parties gave testimony upon the issues involved, and, upon such testimony and the correspondence in evidence, the trial judge found the issues in favor of defendant, and rendered judgment accordingly. Under the well known rule that the verdict or judgment of the lower court will not be disturbed on appeal when founded upon conflicting evidence, we must affirm the judgment, unless it affirmatively appears from the record that reversible error in the proceedings below has been committed. A careful examination of the record fails to disclose such error.

Judgment affirmed.

Decided July 17, A. D. 1915. Rehearing denied July 26, A .D. 1915.

[No. 4115.]

BACCA V. MCDERMOTT.

APPEAL AND ERROR—*Finding Against Evidence.* Judgment reversed.

Error to Las Animas District Court. HON. A. WATSON MCHENDRIE, Judge.

Messrs. MCCHESNEY & MCCHESNEY, for plaintiff in error.

Mr. EARL COOLEY, for defendant in error.

CUNNINGHAM, P. J.

Plaintiff in error, as plaintiff below, brought his action on nine certain promissory notes, which defendant had executed and delivered to him as payee. The complaint was in the usual form. Defendant answered, admitting the execution and delivery of the notes. He then alleged that the notes were given in payment of a balance due on the purchase price of a saloon, including stock in trade and fixtures; that plaintiff agreed at the time of the sale aforesaid to secure the transfer to defendant of the license under which the saloon was being operated, and a renewal of the same, and that if plaintiff failed to secure the transfer of the license and the renewal thereof, the contract of sale of the saloon should be null and void.

Defendant then alleges that plaintiff utterly failed to secure the transfer of the license, and the renewal thereof, and that "on the 3rd day of April, A. D. 1909, elected to rescind the above set forth contract of sale, in accordance with the terms thereof, and repossessed himself of said saloon," etc. In other words, defendant alleged that plaintiff elected to rescind the contract of sale for his, the plaintiff's, own default.

After thus answering defendant counter-claims for $700, which he had paid in cash at the time of the purchase of the saloon, in addition to the notes which he had given. The affirmative allegations of the answer were put in issue by an appropriate reply. The pleadings and the evidence show clearly that defendant relied upon a rescission of the sale, and not upon damages, for the violation of the terms thereof. The evidence establishes beyond doubt that the property sold belonged to an estate of which plaintiff was the administrator, and he sold the same in his official capacity as administrator. The notes sued upon were given him personally by the defendant.

We entertain no doubt from the record that the plaintiff advanced the money represented by the notes, to the estate, and personally took defendant's notes for the money thus advanced. The defendant, in order to secure the plaintiff, gave to the latter a chattel mortgage on the saloon and fixtures. No part of the notes were ever paid, hence the plaintiff took possession of the saloon and the fixtures, under the chattel mortgage.

The evidence fails utterly to establish a rescission of the contract by either the plaintiff or the defendant; hence the defendant's defense and counter-claim failed. The jury allowed the defendant a verdict of $200, indicating clearly that they treated the counter-claim, in spite of the pleadings to the contrary, as though based on a claim for damages, rather than recision. If the recision theory had been established, defendant would have been entitled to recover the entire $700 which he had paid in cash, and to a decree cancelling his notes.

Defendant's own evidence shows unmistakably that he did not regard plaintiff's action in taking possession of the saloon and its fixtures as an attempt on plaintiff's part to rescind the contract, for he testified that he afterwards sold a part of the property, and attempted to secure possession of other portions of it after the plaintiff had taken posses-

sion of the same under the chattel mortgage. Moreover, defendant testified that, "I figured when I had paid him $700 and he took back everything that he had sold me, that he had got well worth his money." And he further stated that he had made no inquiry concerning the disposition of any of the property and said: "I didn't care after he had taken it." He was then asked this question:

"Q. You testified this morning that the notes were in his possession; that you turned the goods over to him and you considered that that settled the transaction?"

To this question defendant answered:

"A. Yes, sir."

Although plaintiff did not bring suit upon the notes until long after he had taken possession of the saloon under his chattel mortgage, defendant appears to have made no demand, until he filed his counter-claim, for the $700 which he had paid in cash, or the return of his notes, and he gave no explanation for his failure in this behalf.

There is evidence in the record indicating that the plaintiff proceeded irregularly under his chattel mortgage, and it may be, upon a proper answer, defendant would be entitled on this account to some relief. The judgment of the trial court will, therefore, be reversed, with leave to the defendant to amend his answer as he may be advised.

Judgment reversed.

[No. 4138.]

THE NORTH STERLING IRRIGATION DISTRICT V. GEHRIG.

Error to Morgan District Court. HON. H. P. BURKE, Judge. ... .

Messrs. MUNSON & MUNSON, for plaintiff in error.

Messrs. ALLEN & WEBSTER, for defendant in error.

MORGAN, J.

ERROR to reverse a judgment for plaintiff in the lower court in her action for damages to her crops and land caused by seepage from defendant's irrigating ditch.

All the material issues in this case have been determined in the case of *North Sterling Irrigation Dist. v. Dickman* (Colo.), 149 Pac., 97, recently decided. The plaintiff in error was the defendant in both cases, and the lands of the plaintiffs were contiguous, and were injured in the same way and at the same time. Therefore, the opinion in that case as to the question of pleading and proving negligence, the measure of damages and the sufficiency of the proof of title are adopted as controlling in this case. The judgment of the lower court, therefore, is affirmed as to the first cause of action and reversed as to the second, with privilege to amend as ordered in that case.

Judgment affirmed in part and reversed in part.

[No. 3938.]

SCHOOL DISTRICT NO. 3 IN CLEAR CREEK COUNTY V. NASH.

1. APPEALS—*Law of the Case.* Where upon writ of error out of the Supreme Court the complaint is held to state a cause of action, this judgment is the law of the case upon a second writ of error in the Court of Appeals. (554.)

2. MASTER AND SERVANT—*Wrongful Discharge—Damages.* Where a sercant is discharged, without cause, before the lapse of the period of his employment, and the sole defense of the master is the failure of the servant to use reasonable effort to secure other employment, such failure is a matter of defense. It is for the master to show what the servant earned, or by reasonable effort might have earned, subsequent to his discharge, and during the period for which he was employed. (556.)

A school teacher, wrongfully discharged, and securing employment in a different locality, is entitled to an allowance for expenses reasonably incurred in seeking new employment and for an increase in his expenses, occasioned by the removal to the new locality, and may show such increase in his expenses, without pleading it. (555.)

But the expense of removing the teacher's family to the new locality can not be considered unless specially pleaded. (556.)

Error to Clear Creek District Court. HON CHARLES MCCALL, Judge.

Mr. JOHN J. WHITE, for plaintiff in error.

Messrs. MORRISON & DE SOTO, for defendant in error.

HURLBUT, J.

October 7, 1905, defendant in error, as plaintiff, filed her complaint in the District Court, alleging in substance that on June 14, 1904, she was employed by defendant as a teacher in one of its schools, at an agreed price of $70 per month, for the period of one year beginning July 1, 1904; that she accepted such employment and performed services as a teacher thereunder until January 1, 1905, at which time, without her assent and without cause, she was discharged from her employment by defendant; that defendant paid her in full for all services up to and including December 31, 1904, but no more; that at all times from said 1st day of January until June 30, 1905, she was ready and willing to perform the services as teacher under said employment, but was prevented from doing so by defendant. To this complaint defendant filed answer containing a general denial and a second defense, alleging that by force of a certain resolution or regulation passed by said defendant on June 13, 1904, such employment was conditioned upon her having or obtaining (on or before January 1, 1905), a first-grade certificate from the county superintendent of schools of Clear Creek county, failing in which the contract of employment would become void and of no effect; further alleging that plaintiff consented to such condition. A reply was filed to this answer, containing a general denial and a "second reply," stating that plaintiff was a graduate of the State Normal School of Colorado, and held a diploma from said school signed by the lawful authorities of that institution, and that the same had been filed with said county superin-

tendent of schools; further averring that under the provisions of section 4128, Mills' Annotated Statutes, said diploma entitled her to teach in any of the public schools of the state, and that the resolution was void, of no effect, and contrary to the terms thereof. The case was tried to a jury, verdict returned in favor of plaintiff for the sum of $185,88, and judgment rendered thereon. The case is in this court for determination by lawful transfer from the Supreme Court.

The contract of employment is founded upon two written instruments, viz.:

"Georgetown, Colo., June 15, 1904.

"Miss Margaret Nash—Dear Madam: You are hereby notified that at a meeting of the board of education, held on Tuesday evening, January 14th, you were reappointed as teacher in district No. 3, Clear Creek county, for the ensuing school year at (70.00) seventy dollars per month. At a meeting held on Monday evening, June 13th, the following resolution regarding the examination of teachers was adopted: 'Resolved, that after January 1, 1905, all teachers in district No. 3, Clear Creek county, shall hold a first-grade certificate.' In accepting this position, unless you already hold a first-grade certificate, you will be required to pass the county examination in December, in accordance with the above resolution. Very respectfully, Will C. Hood, Secretary."

"Georgetown, Colo., June 20, 1904.

"To the Secretary of the School Board, Georgetown, Colo.—Dear Sir: Your notice dated June 15, 1904, containing appointment as teacher in your district for the ensuing year was received by me in due time. I accept the appointment, and am ready to sign a regular contract to that effect. Respectfully yours, Margaret A. Nash."

This is the second trial of this case. The first trial resulted in judgment for defendant, which judgment was taken to the Supreme Court on error, and there reversed. *Nash v. School District No.* 3, 49 Colo., 555, 113 Pac., 1003

The court held that the diploma of defendant in error entitled to her to teach in the public schools of the county without first obtaining a certificate from the county superintendent of schools, and that the resolution was in conflict with the statute, was void, and of no effect as against defendant in error. After determining the matter just alluded to, the court further said: "The facts stated in the complaint, and supported by the evidence, were sufficient to constitute a cause of action in favor of plaintiff, and, unless rebutted, entitled her to a judgment for the actual damages by her sustained."

It is difficult to find in this record sufficient merit to justify the appeal. The issues were clearly defined, and, after the Supreme Court had decided against defendant the only serious question that could likely arise in the case, the latter had no defense left. The complaint stated a cause of action, and the evidence was undisputed and clearly sustained plaintiff in her right of recovery. At the second trial the only thing left for defendant to do, in order to prevent full recovery by plaintiff for the five months' salary, was to diminish the sum by introducing evidence, if it could, showing plaintiff had earned other money during that period, or that she had remained idle and made no reasonable effort to find other employment, which facts, if proven, could be used by defendant to minimize the loss for which it was liable. The spirit shown by the plaintiff is highly commendable, for the record shows that almost simultaneously with her wrongful discharge she sought other employment, and secured the same within less than a week, but at a reduced salary, and in a locality remote from where she had been teaching. There is no doubt that she suffered expense and inconvenience in changing her residence from where she had been employed for four years to her new place of employment.

The only question raised on this appeal which even approaches importance is that relating to expenses allowable to an employe wrongfully discharged, where such expenses are necessarily incurred by such employe in securing new employment, and the necessary additional cost occasioned by the changed conditions surrounding the new employment. At the trial defendant made objection to all evidence which tended to show any expenses incurred by plaintiff in or about the obtaining of the new employment or her removal from Georgetown to Cripple Creek in order to properly establish herself preliminary to entering upon the discharge of her duties, which objections were based entirely upon the contention (1) that such expenses were not chargeable to defendant, and (2) that they were not pleaded in the complaint. We fail to see any merit in either contention. As to the first, counsel for plaintiff in error seems to contend that the items of expense and increased cost of living, etc., testified to by the plaintiff, were charges which plaintiff was seeking to recover from defendant as part of her cause of action. If such be the case, he is clearly in error, as no such claim was made by plaintiff, and the case was not tried on any such theory. When counsel was pressing this contention in the trial court, and claiming that plaintiff was attempting to show these items as recoverable against defendant in the main case, the court interposed and said: "I don't hold it is a charge against the school district. That is not the purport or theory of this examination now. I am trying to find out, and want the jury to know from the testimony of the witness, how much money this teacher earned during the time she should have been employed here, and how much she could have earned with reasonable diligence, minus the expenses that she had above the expenses here; that is what I want to come at. Not any expenses, except those expenses, figured directly, in connection with her work that are in excess of the expenses in that connection that she would have had to sustain here in Georgetown."

The objection, therefore, on the ground given does not appear to have been well taken.

(1-3) Concerning the second ground, we have only been able to find one state, Kentucky, which holds that in an action of this kind the complaint must state that, subsequent to the wrongful discharge, plaintiff made reasonable effort to obtain other employment and failed, or that he thereafter secured other employment and earned a certain sum. As opposed to this doctrine, it is almost universally held, our own Supreme Court being among those so holding, that such matters are entirely for the defendant to show, and, if he fails to do so, the plaintiff will be entitled to judgment for the full amount due for the unexpired term following the wrongful discharge. It is not claimed in the instant case that such matters were pleaded. At the trial, after plaintiff had established by proper evidence her cause of action, her counsel suggested to the court that evidence of matters constituting a rebate against the judgment plaintiff was entitled to should come from the defendant. The court erroneously ruled that plaintiff should proceed to show such rebates in her main case. No exception was taken to the ruling; but, if there had been, no harm would have resulted, as defendant brought out the facts on cross-examination. This ruling of the court explains why we find plaintiff offering evidence to show the rebates, which should have properly come from defendant. Certainly the defendant should not be heard to complain when the court erroneously compels the plaintiff to prove his case for him, and that is the situation here. After plaintiff proved the contract and employment, its breach by defendant and wrongful discharge of plaintiff, the amount of the salary and the period for which she was entitled to recover, her case was complete, and, unless defendant, either by cross-examination or original evidence, had shown the amount earned by plaintiff during that period, she would have been entitled to a judgment for the full period of five months at $70 per month.

It is evident that, if the court had not erroneously compelled plaintiff to make his proof, and she had remained silent, then, after defendant had proven the amount plaintiff had earned after discharge, plaintiff would have been entitled to show in rebuttal her expense in securing the new employment and additional costs to her in performing the duties of such new employment.

[4] The Supreme Court, in *Saxonia M. & R. Co. v. Cook*, 7 Colo. 569, 4 Pac. 111, defined the law as applicable to some of the issues in this case as follows: "Where one is employed to serve for a definite term, as for a year, and is discharged before the expiration of the term, without fault on his part, he has a right to recovery either for the balance of wages due or damages for the loss he may have suffered by reason of the wrongful discharge. * * * Under the remedy in the latter class of cases, *i. e.*, where the action is for breach of the contract, whether brought before or after the end of the term, the measure of damages is not the amount of wages stipulated in the contract for the entire term, but the actual loss, to be established by proof, although the amount of the agreed wages may be taken as the measure of damages *prima facie*, or in the absence of any other showing. He cannot recover the wages accruing for the balance of the term *as a matter of course*. He is bound to use reasonable effort to secure labor elsewhere. If he has secured labor elsewhere, or by reasonable diligence might have done so, the amount received, or that might have been received, for such labor is to be deducted from the amount of damages occasioned by the breach of the contract sued upon. * * * But, while the defendant in such case is entitled to mitigate the damage to the extent of what the plaintiff might have earned from other parties during the term, the burden of establishing such mitigating facts is upon the defendant." See also, *Howard v. Daly*, 61 N. Y., 362, 19 Am. Rep. 285; *Strauss v. Meertief*, 64 Ala., 299, 38 Am. Rep., 8. From 26 Cyc., pp. 1006 and 1009, I quote

the following: "The measure of damages for the breach of a contract of employment is *prima facie* the sum stipulated to be paid for the services, and the burden of reducing the damages by proof that the servant has, or might, with reasonable diligence, have obtained other remunerative employment after his discharge, rests on the employer."

[5] The question as to whether or not one suing for a breach of contract based upon a wrongful discharge before the expiration of the term of employment may charge the defendant with expenses incurred in obtaining new employment for the unexpired term, and for additional necessary expenditures and outlays caused by the change from the old to the new place of employment, seems to be settled in the affirmative by the general trend of authority. In fact, we have been able to discover only one case, *Tickler v. Andrae Mfg. Co.*, 95 Wis. 352, 70 N. W. 292, which seems to hold to the contrary.

In *Development Co. of America v. King*, 170 Fed. 923, 96 C. C. A. 139, the court held that one wrongfully discharged was entitled to subtract from the amount of money earned by him in another employment thereafter a certain sum which he had paid for stock in a corporation, which stock it was necessary for him to purchase in order to obtain employment; the court saying: "The purchase of the stock was an expense incident to obtaining the employment."

In *Tufts v. Plymouth G. M. Co.*, 14 Allen (96 Mass.) 407, the court held that one wrongfully discharged before the expiration of the term of employment was entitled to have considered his necessary expense in traveling to the place of his new employment; the court saying: "If he was obliged to return home or go elsewhere, the expense of removal from the mines to the place of employment became a proper subject of consideration."

In *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853, it was held that a servant wrongfully discharged before the expiration of his term of employment

was entitled to have deducted from the wages he earned during the term, or might have earned, the expense of obtaining employment elsewhere; the court saying: "In estimating his damages, therefore, such sums as he, by reasonable diligence, might have earned in a similar business, making allowance for the expense of obtaining employment, should be deducted from the wages he might have earned under the broken contract. * * * The burden of proof is on the employer to show that the servant might have obtained similar employment, for the failure of the servant to obtain other employment does not affect the right of action, but only goes in reduction of damages, and, if nothing else is shown, 'the servant is entitled to recover the contract price upon proving the employer's violation of the contract, and his own willingness to perform.' The fact that the servant might have obtained new employment does not constitute a defense. It is one of the facts to be considered in estimating the servant's loss."

To the same effect: *Pennsylvania Co. v. Dolan,* 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 310; *Dickinson v. Talmage,* 138 Mass. 249; Sedgwick on Damages (8th Ed.), secs. 666, 667.

The opinion in the Wisconsin case of *Tickler v. Andrae Mfg. Co., supra,* is brief, and cites but one authority, and that upon a different proposition. We quote from the opinion of the appellate court as follows: "The jury was instructed, in effect, that, in case they found for the plaintiff upon the principal issue, they should give him the amount of the agreed wages for the year, $900, less such sums as he had earned and received from other sources, and that to that result they should add the sum of his reasonable expense in removing himself, his family and stuff from New London back to Milwaukee. * * * This was error, for, while the defendant is entitled to be credited by the plaintiff's net earnings only, yet it may fairly claim that its proper credit shall not be diminished by any sum which he

shall expend for his own purposes, or for the convenience of his family. The expenses of the return of the family to Milwaukee were not within the defendant's undertaking."

[6] So it appears from this that the court considered the removal of the plaintiff and his family from New London back to Milwaukee as an act done *for his own purposes,* and inferentially at least not for the purpose of obtaining a new employment after his wrongful discharge. The facts there are entirely different from those of the instant case. Here the plaintiff's *only* purpose in going to Cripple Creek from Georgetown was to teach in the public schools of that town, and it was clearly for the benefit of the defendant to have her go, as her earnings in Cripple Creek would reduce that much the defendant's liability to her. In the case at bar plaintiff did not recover any amount for moving her family to Cripple Creek. The trial court excluded from evidence the testimony which tended to show that plaintiff had expended $50 in removing her family to Cripple Creek from Georgetown. This ruling was clearly right, if for no other reason than that it had not been pleaded. If allowable at all, it must have been specially pleaded.

It is impossible to ascertain from this record just what method was adopted by the jury in arriving at the verdict of $185.88. The evidence conclusively shows that the unexpired term of the employment was 5 months, and the agreed price was $70 per month, making $350, which measured plaintiff's recovery, and that plaintiff received the total sum of $285 during that time from her new employment. This left a credit due her of $65. The evidence further shows that plaintiff expended, while in Cripple Creek, during the unexpired term, $20 a month more for her living expenses than she would have paid in Georgetown. She was there four months and three weeks, which would make the total amount $95, to which should be added her railroad fare to Cripple Creek, $8, and 70 cents for telephoning to that place accepting the new employment; the total being

$103.70, which, if the jury believed correct, should have been deducted from the $285 she had earned, before subtracting the same from the $350. The amount of $103.70, however, was apparently not allowed by the jury, but only $60 thereof, for if $60 be deducted from the $285, and the balance, $225, from the $350, it will leave a balance of $125, which, with interest at 8 per cent. for 6 years, will amount to just $185.

It is clear that the second trial, and appeal by defendant, has been vexatious and unreasonable. It is also evident that the wrongful discharge of plaintiff caused her, aside from distressing inconvenience and discomfort, a considerable expenditure and outlay in excess of any amount which by law she could recover for the breach. Plaintiff had been teaching in the schools of the Georgetoown district for four years prior to the making of the contract in issue, and it is a fair presumption that she was a competent and faithful employe. She was the support of her mother and sister, who were dependent upon her, and they were settled and keeping house in Georgetown. She was arbitrarily and wrongfully discharged in the midst of winter, but, with enviable spirit, at once set about finding new employment, and succeeded in the short space of one week in securing, at a distant town, like employment to that she had been engaged in. This new employment naturally compelled her to break up her home in Georgeton and move her "family," as she terms it, to the new place.

Her speedy and successful efforts, which resulted in the new employment, were all to the direct financial benefit of defendant, and it is to be regretted that defendant did not magnanimously concede plaintiff the pittance allowed her by the jury for expenses and outlays incurred in and about securing new employment, and increased expenses ensuing therefrom, particularly as no complaint is made against her for inefficiency or insubordination.

The instructions as a whole are free from prejudicial error. The judgment will be affirmed.

Judgment affirmed.

[No. 3939.]

SCHOOL DISTRICT NO. 3, CLEAR CREEK COUNTY V. OLSEN.

The case ruled by the judgment in *School District v. Nash, ante.*

Error to Clear Creek District Court. HON. CHARLES MCCALL, Judge.

MR. JOHN J. WHITE, for plaintiff in error.

MESSRS. MORRISON & DE SOTO, for defendant in error.

HURLBUT, J.

December 30, 1910, defendant in error, as plaintiff, commenced this action to recover damages for breach of contract, and recovered judgment for $163.39.

The issues here, both of law and fact, are substantially the same as those involved in the case of *School District No. 3 v. Nash* (No. 3938), 140 Pac. 473, decided at this term. By stipulation the two cases were consolidated and tried together. There is a slight difference in the pleadings of the two cases. In the Nash case none of the pleadings contain any allegations as to defendant's earning any money after her wrongful discharge; while in the present case the answer alleges that plaintiff found other employment after her discharge and earned money to the amount she would have earned under her contract had she not been discharged. Defendant offered no evidence at the trial.

The undisputed evidence shows that plaintiff was was wrongfully discharged, and was entitled to recover $70 per month for five months, or $350, and that she earned during said period of five months $240, which defendant was entitled to have substracted from the $350. This would leave a balance due plaintiff of $110, plus interest thereon for six years at 8 per cent., which would amount to $52.80. This added to $110 equals $162.80. Plaintiff was clearly entitled to judgment for this sum.

This appeal is without merit, vexatious, and unreasonable in a marked degree. What was said in the Nash case may be repeated here with emphasis.

We discover no reversible error in the record. The judgment will be affirmed.

Judgment affirmed.

[No. 3820.]

DEGGE V. CARSTARPHEN ELECTRIC COMPANY.

1. APPEALS—*Party Bound by Position Assumed Below.* A party is concluded by the interpretation which in the court below he places upon his adversary's pleading. Plaintiff's reply first admitted the allegations of the answer, but in a subsequent passage traversed a material allegation thereof. During the trial the attention of the court was not called to this admission, and the cause was tried throughout without reference to it, and as if the record showed no admission. *Held* the admission should be disregarded on appeal. (565, 566.)

2. —— *Finding on Sufficient Evidence,* though conflicting, will not be reviewed. (566.)

3. —— *Harmless Error.* Complaint for goods sold, in two counts, the first alleging a promise to pay the reasonable value, the second to pay a specified sum. The second count was clearly proven and, in effect, admitted. *Held* the denial, of a motion to require plaintiff to elect between the counts was harmless. (566.)

Appeal from Denver County Court. HON. GEORGE W. DUNN, Judge.

MR. O. A. ERDMAN, for appellant.

MR. RICE W. MEANS and MR. BERNARD J. FORD, both for appellee.

MORGAN, J.

The defendant appeals from a judgment against him for $632.60, entered in the Denver County Court on a complaint filed October 5, 1910, which contained two causes of action for goods sold and delivered: The first, upon a promise to pay the reasonable value thereof; and, the second, upon a promise to pay a specified amount. The defendant denied both causes of action, by general denial, and, for a third defense, pleaded that the goods sold consisted in part of a certain electric automobile and that the sale was "upon condition that the said vehicle should prove to be in a merchantable condition, with a storage battery of standard capacity, that is to say, a capacity sufficient to propel said vehicle a distance of 50 miles or more with each full charge of electricity;" and, pleading further, that the plaintiff shipped the vehicle to the defendant "equipped with a storage battery which the said plaintiff represented to be of standard capacity with power sufficient to propel the said automobile a distance of 50 miles or more on ordinary roads," following with an allegation that the said storage battery was not of standard capacity, was not capable of propelling the said vehicle more than 27 miles on ordinary roads with one full charge of electricity, and then alleging that the defendant offered to return the said vehicle in as good condition as it was received and that the plaintiff refused to accept such offer. The plaintiff replied, admitting the allegation of paragraph 3, which contained the first con-

dition set forth, but further on in the replication alleging that the vehicle was the same as represented, and denying that it represented that the vehicle contained "a storage battery of standard capacity with sufficient power to propel said automobile a distance of 50 miles or more on ordinary roads with each full charge of electricity," then denying new matter not already admitted. On these pleadings the case was tried by the court, without a jury; and on the trial the defendant moved the court to compel the plaintiff to elect upon which cause of action it would stand, which motion was denied. The court, after hearing the testimony, found for the plaintiff, and also found that the sale was absolute and not upon any condition such as the defendant alleged. The appellant in his brief discusses the errors assigned under three questions: (1) Was the sale absolute or conditional? (2) If conditional, were the conditions met? (3) Did the court err in declining to require the plaintiff to elect?

The principal question to be determined is whether the court was justified in finding from the evidence that the sale was absolute, and whether this court will disturb such finding if based upon conflicting testimony.

[1] The defendant contends that the plaintiff admitted in its replication that the sale was conditional by admitting the allegations of paragraph 3, and it so appears; however, the case was tried throughout and the judgment rendered, as though it had been denied, without calling the court's atention to this admission; no allusion to it is made in the motion for a new trial, and the evidence of the defendant quite clearly shows that he did not rely upon such admission, as he attempted to prove that the sale was conditional.

Where a case is tried by the parties as though a special plea is denied, and no offer is made to rely upon an admission thereof, and it is contended by the one making the admission that it was inadvertently made and was not intend-

ed to be such, the admission should be disregarded on appeal, especially when the replication, as in this case, thereafter denies a similar plea.

[2] This apparent admission being thus disposed of, and the evidence examined, it appears that the testimony is quite conflicting as to whether the sale was upon the condition pleaded. The plaintiff testified that the automobile was sold upon a guaranty that the battery would run 6,000 miles, and that no guaranty, or representation, was made that it would run 50 miles on one charge of electricity. The defendant testified that there was a guaranty that the automobile would run 50 miles on ordinary roads, on one charge of electricity. Under the established rule, with this conflict in the testimony, the finding of the lower court on this issue will not be disturbed.

Having concluded that the judgment of the lower court should not be disturbed in the finding that the sale was not conditional, it is unnecessary to discuss the second contention of appellant.

[3] While the court might have required the plaintiff to elect between the two causes of action, yet, as the trial was before the court without a jury, the defendant was not prejudiced in any way by the failure of the court to enter an order requiring the plaintiff to so elect. The evidence disclosed quite clearly that there was no dispute as to the value agreed upon and the promise of the defendant to pay the same. The court, in view of the evidence, could have eliminated, and it may be assumed it did eliminate, from its mind the first cause of action, and entered the judgment upon the second cause of action.

The judgment of the lower court is affirmed.

[No. 3814.]

MAUSER V. HURDLE.

PLEADING—*General Denial.* Action by broker against land owner for commissions under a sale secured by the broker. If the land owner would assert the revocation of the broker's authority previous to the sale he must plead it specially. (568.)

The evidence examined and held to establish affirmatively that broker's authority had not been revoked. (569.)

Appeal from Larimer District Court. HON. NEIL F. GRAHAM, Judge.

MR. GEORGE A. CARLSOK and MR. CLAUDE C. COFFIN, for appellant.

MESSRS. CLAMMER & TEMPLE for appellee.

CUNNINGHAM, P. J.

Action by real estate agent to recover commission alleged to have been earned by producing a purchaser ready, able and willing to buy, to whom the defendant, appellant, refused to convey. From a judgment in favor of appellee, the action is here on appeal.

The complaint was in the usual form in cases of this character, and the answer amounted to no more than a general denial. No new matter whatever was pleaded by way of answer. The uncontradicted evidence is that the plaintiff produced a purchaser ready, able and willing to buy on the terms and conditions stated in the original agreement betewen plaintiff's firm (plaintiff succeeded to the rights of his firm by an assignment of the claim here sued upon), and appellant, the owner of the land. Counsel for appellant, with commendable frankness, states in his brief that the substantial issue in the case (on trial below), was whether or not the listing of the farm for sale in the fall of 1908 was that upon which he did act in March, 1909, when Melvin

was produced as an alleged purchaser; and with equal frankness counsel states the real issues or contentions presented for our consideration on this appeal, in the following language: "Had this question, the one just stated, been properly submitted to the jury by fair and impartial and appropriate instructions by the trial court, we feel this appellant would not have the case before this court for review. * * * While many errors have been assigned, we deem it necessary only to consider the instructions requested by defendant and the instructions given by the court." From the instructions tendered by appellant, and from the argument made here on brief, it appears that his sole defense is that the authority given by Mauser in the fall of 1908 for the sale of the farm had been revoked before plaintiff produced a customer ready, able and willing to buy. As we read the record, there are two objections fatal to this contention:

[1] Defendant did not plead revocation in his answer, or any modification whatever of the original contract, but contented himself with denying that such a contract was entered into, or, if entered into, that it was carried out by plaintiff. Under a general denial the defendant had no right to prove revocation. In 1 Enc. Pl. & Pr., p. 849, it is stated that "release must be specially pdeaded," and at page 851 it is said: "In an action by a contractor to recover the contract price, the defense that the contractor did his work in an unworkmanlike manner is new matter to be pleaded." While these are not exactly parallel situations, by analogy they afford authority for the conclusion that we have reached. In *Alden Investment Co. v. Carpenter*, 7 Colo., 92, 1 Pac., 907, our Supreme Court announces that "a failure of consideration, which must always occur subsequent to the making of the contract, and which if pleaded as a defense, may well be regarded as new matter in avoidance of the original cause of action." A revocation, of course, like a failure of consideration, can only occur subsequent to the making

of the contract. See, also, *San Juan County v. Tulley*, 17 Colo. App. 113, 67 Pac. 346; *Baisch v. Mueller*, 53 Colo. 474, 128 Pac. 466; Pomeroy's Code Remedies (4th Ed.), secs. 583-586.

[2] There is no evidence in the record of a revocation. On the contrary, the defendant's own testimony indicates quite the opposite. On cross-examination he was asked the following questions, to which he made the answers here given: "Q. Is it not a fact that, after concluding that you had your place listed too low, that you tried to do everything in your power to back out of the deal that Hurdle had arranged for you? A. No, sir; it is not. Q. You knew you had listed it too low? A. No, sir, I did not. *I had a chance to take it off if I thought it was too low. I could take it off if the price did not suit me.*" This is tantamount to an admission by defendant that his farm, at the time of the negotiations, was still listed with plaintiff, and at the price first fixed by him. Four witnesses on behalf of plaintiff testified that, when plaintiff drove to the farm with the prospective customer, and for the first time took up the question of the sale of the farm directly with Mauser, he (Mauser) said, in substance, "that he had *thought* of taking the farm off the market, *but that he had not done it.*" Thereupon he directed the plaintiff to show the customer over the land, and permitted them to return to town, a distance of 12 miles, and a few days later come back and stay all night with him at the farm, at which time an unconditional offer was made by the customer for the farm; the offer being the same, both as to amount and terms, as that contained in the orignial listing agreement or contract. Indeed, the defendant himself testified that Hurdle said to him at one time: "If you want it, take your $12,000 and get off; *but I didn't think he meant it.*" Just prior to this statement by Hurdle it is testified that they were parleying, with a view of inducing Mauser to accept, not a less price for the land than agreed upon in the original listing, but to accept $8,000 in cash, as

a first payment, instead of $12,000, which was provided for by the terms of the original listing agreement. At no time did defendant testify that he stated to Hurdle, when the latter called upon him with a customer, or thereafter, or at all, that he desired to raise the price he had put upon his farm, or wished to withdraw it from the market, nor did he pretend, while on the witness stand, that he at any time informed Hurdle that the latter's authority had been revoked or modified in any particular. It is true that there was considerable preliminary negotiation as to the amount to be paid down, and as to when possession should be given, and other details not necessary to refer to; but the fact remains that at the end of these negotiations, and before defendant had indicated any purpose of withdrawing the land from the market or raising his price, the customer produced offered to pay him the original listing price and the amount in cash called for by that agreement. Under these circumstances, the trial court did not commit error in refusing to submit the question of revocation to the jury; indeed, it is our impression that at the close of all the testimony the trial court would have been warranted in instructing the jury to return a verdict in favor of plaintiff for the same amount in which the jury thereafter found.

Judgment affirmed.

[No. 4061.]

LOVELAND AND ESTES PARK AUTO CO. V. PARKS.*

ACTION FOR NEGLIGENCE. Judgment founded upon sufficient evidence and under proper instructions, affirmed.

Per curiam.

Action by defendant in error against plaintiff in error to recover for damages growing out of injuries to a mule belonging to defendant in error, which injuries were occasioned by the plaintiff in error running upon the mule with an automobile truck. The question of the negligence of the plaintiff in error and the contributory negligence of the defendant in error were fairly submitted to the jury, which found, on both questions, in favor of the defendant in error. The evidence, covering almost 600 folios, has been condensed into 5 pages of the printed abstract, thus necessitating an examination of the original bill of exceptions. We are satisfied from such examination that the evidence is amply sufficient to warrant the verdict of the jury; hence the judgment of the trial court is affirmed. Judgment affirmed.

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*The delay in the publication of this and the four preceding cases, is attributable to the fault of a former printer in mislaying the manuscript.

INDEX.

ACTION.

Damnum Absque Injuria.—A corporation had agreed to convey to defendant, certain lands and water rights upon conditions specified. Defendant assigned the contract to plaintiff, agreeing to pay the interest up to a certain date upon the installments of purchase money due to the corporation. *Held* that though defendant had defaulted, the plaintiff, not having himself made the payment, nor sustained any injury by defendant's default, was not entitled to an action.—*Butler v. Maier*, 365.

When Expense of Defending an Action Recoverable.—In general no action is allowed for the expense of defending a civil action. Instances have occurred where, the action being vexatious and without any reasonable cause, a recovery has been permitted against either the party suing, or the one who instigated the suit.—*Geijsbeek v. Martin*, 316.

Pleading.—The complaint must allege that the action was vexatious, and without reasonable or probable cause. In the absence of such allegation there can be no recovery.—*Id.*

AGISTOR.

Who Is—Lien.—Sorrells and Davis entered into an agreement in writing by which Sorrells agreed to sell to Davis a certain acreage of pasture, upon a ranch named, and all the hay upon the ranch not needed for his own use, and Davis agreed "to feed 2,000 head of sheep" on the same ranch, and pay Sorrells a specified monthly rate "for feeding and taking care of said sheep," the compensation to commence "with the delivery of the sheep on said ranch, and continue until the sheep are taken away." Sorrells at the time was part owner of the ranch, and engaged in general farming, as well as in feeding and caring for the sheep of others. The sheep were delivered upon the ranch, and were thereafter under the exclusive care and control of Sorrells. Davis was seldom at the ranch, and only for a brief stay upon each occasion. He assumed no authority or control as to the manner of feeding or caring for the sheep. Sorrells, pursuant to a verbal agreement, bought and fed to the sheep large quantities of hay and grain, in addition to that by him sold to Davis.

Held, that Sorrells was an agister, and under the statute (Rev. Stat., sec. 4013), was entitled to a lien upon the animals for their care and sustenance.—*Sorrells v. Sigel-Campion Co.*, 154.

The agreement of Davis "to feed 2,000 sheep" on the ranch, *held* to import merely an obligation on his part to deliver upon the ranch the specified number of sheep, to be fed and cared for by Sorrells.—*Id.*

Liability.—An agister is not an insurer of the safe return of the animal bailed to him. He is liable only for want of ordinary care.—*Herbert v. Patrick*, 204.

APPEALS AND ERROR.

Law of the Case.—Where upon writ of error out of the Supreme Court the complaint is held to state a cause of action, this judgment is the law of

APPEALS AND ERROR—Continued.
the case upon a second writ of error in the Court of Appeals.—*School District v. Nash*, 551.

Presumptions.—It will not be presumed in favor of the party successful below that the trial court considered evidence which, upon his objection, was excluded.—*Craft v. Livernash*, 1.

Defendant's counsel announced at the opening of the trial that the defense was purely equitable.

Judgment for plaintiff, and error brought. There being no bill of exceptions, it was assumed that defendant adhered throughout the trial to the theory announced at the opening.—*Coe and Stedman Co. v. Coryell*, 61.

Where the issues are tried by the court without a jury it will be presumed that the rule of damages adopted was the true rule if there is nothing in the record to the contrary.

Action by a teacher for an alleged unlawful discharge, before the lapse of the term of employment. There was evidence of other like employment offered plaintiff, at the same place, for the same salary, and the same time, on condidition that he should renounce all claim against the first employer for the discharge. It was assumed that the trial court found that plaintiff was not justified in refusing the position so last offered to him.—*Ryan v. Mineral High School District*, 63.

Presumed that the trial judge did not consider incompetent testimony.—*Fulton Co. v. Smith*, 279.

Where there is no bill of exceptions, it will be presumed in the court of review that the evidence was not of such character that an erroneous instruction misled the jury.—*Nelson v. Nelson*, 104.

What May Be Assigned for Error.—Trial by a special jury instead of the regular panel will not avail on appeal, where no objection thereto appears in the record.—*Herbert v. Patrick*, 204.

Error can not be assigned upon the refusal to allow an answer to a question where the purpose of the question, or the testimony sought to be elicited, is not made to appear.—*Butler v. Maier*, 365.

Findings on Conflicting Evidence.—Proceedings in *habeas corpus* for the custody of a child are an exception to the general rule that findings of fact will not be disturbed in the court of review, unless manifestly against the weight of evidence.

The testimony being substantially in equipoise, the court refused to disturb the rulings of the trial court.—*People v. Batton*, 39.

Verdict upon conflicting evidence will not be disturbed.—*Herbert v. Patrick*, 204.

Verdict upon conflicting evidence, when sufficient, will not be disturbed, if the case was fairly submitted upon proper instructions.—*Post v. Lang*, 225.

Verdict on sufficient evidence, under proper instructions, will not be disturbed.—*Read v. Craft Company*, 28.

Finding on sufficient evidence, against which there is nothing conclusive in the record, is decisive in the court of review.—*Lauer v. Kaufman*, 419.

Finding on conflicting evidence, sustained.—*Fogg v. Quackenbush*, 480; *Milliken v. Neil*, 545; *Degge v. Carstarphen Co.*, 563.

APPEALS AND ERROR—Continued.

Technical Defects.—Under the act of 1911 (Laws 1911, c. 6, sec. 20), generality and indefiniteness of averment, not objected to in the court below, will not warrant the reversal of a judgment otherwise unimpeachable.—*Selkregg v. Thomas,* 259.

Finding Against Evidence Disregarded.—A policy of insurance against loss by reason of injuries to a servant, provided that where any physician other than those in the service of the insurer should be called, the insurer should be liable only for the cost of the "first aid." The physician employed was not in the service of the insurer, but was called at its instance. He made several visits, and charged a bill of $50.00. He testified that this was the fair value of the first visit, and there was no testimony to the contrary. The judgment was affirmed, although the judge before whom the issues were tried, without a jury, found that the value of the first aid was $25.00.

Reason assigned by the Trial Judge will be disregarded if there is no error in the judgment.—*Ocean Co. v. Joslin Co.,* 52.

Evidence by Deposition—Effect.—The court of review places its own interpretation upon what is set down in depositions read in the court below, without regard to the verdict of the jury.—*Morrison v. McCluer,* 264.

Where the evidence is by deposition the court of review has the same opportunity to judge of its weight as the court below. A decree manifestly inequitable, and against the weight of the evidence, reversed.—*Rinderle v. Morse,* 457.

General Findings—Construction.—A general finding will not be interpreted as declaring that of which there is no evidence.—*Fulton Co. v. Smith,* 279.

An Insufficient Reason for a Correct Judgment is not error.—*Culkin v. Matz,* 198.

Questions not decided below will not be considered in the court of review.—*Sorrells v. Sigel-Campion Co.,* 154.

Improper statements of counsel not objected to at the time wil not be considered upon appeal.—*Post v. Lang,* 225.

Party Bound by Position Assumed Below.—A party is concluded by the interpretation which in the court below he places upon his adversary's pleading. Plaintiff's reply first admitted the allegations of the answer, but in a subsequent passage traversed a material allegation thereof. During the trial the attention of the court was not called to this admission, and the cause was tried throughout without reference to it, and as if the record showed no admission. *Held* the admission should be disregarded on appeal. —*Degge v. Carstarphen Co.,* 563.

Harmless Error—Habeas Corpus for the custody of an infant. The court below declining to commit the child to the custody of the guardian failed to order that the respondent should, in its religious training, conform to the expressed wishes of the deceased parent. *Held,* in view of the declared willingness of the respondent to comply with the parent's wishes, and that the court below might at any time, upon application, make the order, the error was not fatal.—*People v. Bolton,* 39.

APPEALS AND ERROR—Continued.

Action for deceit. The court charged that if the jury should find for the plaintiff they should also state in their verdict that defendant was guilty of fraud and wilful deceit. There was no entry upon the docket of the court of the term for which the defendant might be committed, and no order of commitment. *Held* that the error in the instruction was harmless. (Laws 1911, c. 6, sec. 20.)—*Howard v. Mitchell*, 45

An instruction, which, considered with the residue of the charge could not have misled the jury, will not, though open to criticism, entitle the defeated party to a new trial.—*Read v. Craft Co.*, 28.

Complaint for goods sold, in two counts, the first alleging a promise to pay the reasonable value, the second to pay a specified sum. The second count was clearly proven and, in effect, admitted. *Held* the denial, of a motion to require plaintiff to elect between the counts was harmless.—*Degge v. Carstarphen Co.*, 563.

Cross Errors not assigned, will not be noticed.—*American Co. v. Vickery*, 96.

Abstract.—Where the abstract sets forth only the single instruction complained of it will be presumed that the others given properly stated the law.—*Howard v. Mitchell*, 45.

A motion to strike off an abstract because not in strict compliance with the rules, denied; but counsel admonished that a rigid enforcement both of the old and new rules may be expected.—*Wood v. Yant*, 73.

Writ of Error—Where the Writ Lies—Final Judgment.—Petition for an order requiring the receivers of a railroad to surrender cetain locomotives sold to the ailroad company by a conditional contact under Rev. Stat., secs. 5523-5525, the title being retained until full payment of the purchase price. No cause against the petition was shown by the answer. *Held* that an order denying the petition had the effect of a final judgment disposing of the rights of the petitioner and that error lay to review it.—*Central Locomotive Works v. Smith*, 449.

Scire Facias—Limitation—Where the *sci. fa.* to hear error is not issued until after the lapse of three years from the rendition of the judgment complained of, the writ of error must be dismissed.—*Cooper v. Golden, etc., Co.*, 499.

Judgment.—The judgment of the court below affirmed as to the sum awarded plaintiff, and reversed for error in not submitting to the jury his demand for an additional amount.—*Selkregg v. Thomas*, 259.

ATTORNEYS.

Lien—When Allowed.—An attorney who, upon the retainer of the complaining party, and upon an agreement that he shall receive as his compensation a specified share of the recovery, has instituted an action for a tort, and has notified the defendant of his claim for a lien, is entitled to a lien upon the cause of action for the value of his services. (Rev. Stat., secs. 242, 243.)—*Miller v. Houston*, 89.

Statute Construed.—Nothing in the statute indicates a purpose to exclude causes of action for personal injuries; and in view of the recent development of our factory, power and transportation systems, and mining in-

ATTORNEYS—Continued.
dustries, there is every reason why such causes of action should be included therein.—*Id.*, 89.

Collusive Settlements, with the client, to defeat the just claim of the attorney, are not favored.—*Miller v. Houston*, 89.

ATTACHMENT.

Re-Delivery Bond—Second Levy on Same Goods—Effect.—The levy of an attachment upon goods attached in a former action by the same plaintiff and for which a re-delivery bond has been given, has not the effect to discharge the surety in such bond.

To effect such discharge the goods must be sold by the sheriff, pursuant to the second attachment, or must, by the act or connivance of the plaintiff, be put beyond the reach of the surety or his principal.

A second levy by the sheriff in violation of the directions of the plaintiff has not the effect to discharge the surety in a re-delivery bond given upon the first. *Schneider v. Wallingford*, 4 Col. Ap., 150, distinguished.—*Curry v. Equitable Co.*, 175.

BILL OF EXCEPTIONS.

When Necessary.—Where the evidence is not in the record it will be presumed in the court of review that it was not of such character that an erroneous instruction would necessarily or probably mislead the jury.—*Nelson v. Nelson*, 104.

Where there is no bill of exceptions the court of review will be unable to determine that the refusal of an instruction was in any way prejudicial to the defeated party.—*Gregg v. Hayes*, 412.

BODY JUDGMENT.

See EXECUTIONS.

BROKER.

Authority—A broker employed merely to find a purchaser for lands upon specified terms has no authority to execute a written contract of sale binding the land owner.—*Craft v. Livernash*, 1.

Several Employed—Liability of Principal.—Where the same lands are listed with several brokers, the land owner is liable for commissions only to the one who is the procuring cause of the sale; but the land owner must remain neutral, affording to each an equal opportunity. Failing in this duty, and discriminating in favor of one of the rival brokers, he may be made liable for double commissions.—*Idelson v. Robinson*, 507.

Evidence examined and the land owner held liable to plaintiff, though he had paid commissions to another.—*Id.*

One Employing Broker to sell Land of which another is the Owner, is liable for commissions if a sale is effected.—*Id.*

Right to Commission.—To entitle the broker employed to find a purchaser of lands, to his commissions, it is not necessary that he should secure the execution of a contract binding the purchaser.

If the name and address of the proposed purchaser are furnished to the vendor, or, as it seems, if the name and address come to the vendor from other sources, in due season, so that he has opportunity to negotiate with

BROKER—Continued.
him and secure a binding contract, the failure to secure such contract is not to be charged to the broker.—*Craft v. Livernash*, 1.

That no sale is completed does not affect his right, if the failure was without fault on his part.—*Id.*

The broker having, within thirty days after objections made to the title by the proposed purchaser, surrendered the deposit and contract of purchase made by such purchaser, without the knowledge or consent of his principal, and without informing his principal of a provision in the contract or offer of purchase, for the correction of defects in the title within a reasonable time, Bell, J., and Morgan, J., were of opinion that the broker was not entitled to his commission.—*Id.*

CASES OVERRULED, DISTINGUISHED OR EXPLAINED.

What is said in *Cooper v. German Bank*, 9 Colo. App., 169, as to the inadmissibility of parol evidence to show the purpose for which a promissory note was delivered, is modified by later opinions of this court, and numerous opinions of the Supreme Court. *Wells v. Colorado Company*, 49 Colo. 508, commented upon and explained.—*Divine v. Western Slope Association*, 368.

Anything in *Denver Co. v. Gustafson*, 21 Colo. Ap., 178, conflicting with the approved doctrine as to The Last Clear Chance, overruled.—*Colorado Springs Co. v. Merrill*, 382.

CHATTEL MORTGAGE.

Effect.—In Colorado a chattel mortgage is a conditional sale, becoming absolute on breach of any of the mortgage conditions.—*Sorrells v. Sigel-Campion Co.*, 154.

But the title so created is limited to the chattels specifically described. It does not extend to the subsequent increase of live stock therein mentioned. —*Id.*

Of Sheep and "the Increase," does not, where possession remains with the mortgagee, pass the young afterwards born; and in no case does it pass the wool afterwards clipped, before breach of the mortgage conditions. If before breach the mortgagor clips and sells the wool the purchaser takes a title freed of the mortgage lien.—*Id.* 154.

Defective Acknowledgment.—A chattel mortgage acknowledged before a notary public, but to the certificate of which acknowledgment the notary has failed to affix his seal, is valid between the parties thereto.—*Peden v. Birkle*, 323.

Invalidity Cured by Possession Taken.—A writing intended to secure an indebtedness due to a particular creditor, followed by possession, was held valid as a common law mortgage, though it named no person as mortgagee; and was awarded precedence over a subsequent mortgage executed by the same mortgagor.—*Morrison v. McCluer*, 264.

As to goods of which no possession was taken held otherwise.—*Id.*

Annual Statement of the Debt.—Even though the annual statement of the indebtedness secured by a chattel mortgage is not recorded, as required by statute (Rev. Stat., sec. 515), the mortgage is valid as to the mortgagor, as to an assignee of the chattels who has covenanted to pay it, and one who,

CHATTEL MORTGAGES—Continued.
not being a *bona fide* holder claims under such assignee.—*Thompson v. Rowe*, 361.
COMMON CARRIERS.
Contract Exempting Carrier from liability for his own negligence, or that of his agents, is prohibited by law.
The evidence examined and held sufficient to charge defendant with negligence in the management of its train, while conveying plaintiff's live stock, and to exonerate plaintiff from the charge of contributory negligence. —*Union Pacific Co. v. Libby*, 111.
Connecting Carriers.—Action for injuries to live stock while being transported upon defendant's train, and which it received from a prior carrier in the line. There was evidence that ten out of one hundred and ninety-two animals died, while in the possession of the former carrier, and plaintiff testified that the "jerking" of the cars upon the line of the former carrier would affect them some.
Defendant's agent, sworn in his behalf, expressed the opinion that one hundred and eighty-two animals delivered to defendant "were all in fair condition" at the time of such delivery. *Held*, there was no substantial evidence to support the contention that any mismanagement of the train of the first carrier contributed to the subsequent death or injury of the animals delivered to defendant.—*Union Pacific Co. v. Libby*, 111.
CONSTITUTIONAL LAW.
Construction of the Constitution.—The construction given by the court of final resort of another state to a constitutional provision which we have adopted from that state is persuasive, if not controlling, in the construction of our fundamental law.—*Crystal Park Co. v. Morton*, 74.
Legislative Construction.—It will be presumed that the first general assembly, sitting at so short a time after the adoption of the constitution, and composed in part of the members of the constitutional convention, did not intend, in their enactments, to contravene the provisions of the constitution, so recently adopted.
The court referred to other sections of the statute as supporting the construction placed upon the statute in question.—*Id.*
CONTRACTS.
Validity—Public Policy.—An agreement, made in good faith, between the widow of an intestate, and a creditor, that the latter shall be appointed as administrator, and shall make no charge for his services, is in the interest of creditors heirs and distributees, and is not contrary to public policy.—*Fogg v. Quackenbush*, 480.
The court should not be astute to find reasons to nullify such agreement after it has been acted upon by the parties.—*Id.*
No recovery can be had between the original parties upon a promissory note given as part of a scheme to defraud the creditors of the payee.—*Abernethy v. Wright*, 239.
Even in the absence of legislation upon the subject the courts will declare void any contract opposed to sound policy or good morals, either as to

CONTRACTS—Continued.
the consideration or the thing to be performed.—*Oliver v. Wilder*, 337.

In determining whether a particular contract contravenes public policy, the test is not always, or necessarily, what acts were thereby contemplated or the actual result, but rather whether the tendency of the contract is evil.

In contracts for public supplies consideration of the most efficient and economical mode of meeting the public wants should control. Whatever tends to introduce other elements in the transaction is against public policy. —*Id.*

In the year 1912 a general election was approaching, at which certain amendments proposed to the constitution were to be submitted. By statute the Secretary of State was required to publish these amendments in not more than one newspaper in each county, and a maximum fee for such publication, greatly in excess of the actual cost, was prescribed. One Pearce, then Secretary of State, being a candidate at the same election, summoned before him the publishers of three newspapers then published in Conejos County, and in order to induce "the loyal and unstinted support" of these journals "to every nominee on the Democratic ticket," made a contract, letting to the publisher of one of the three papers the publication of the amendments, at the maximum price specified by the statute, the publisher agreeing to divide the amount which he should so receive with the others, giving each one-third thereof. The actual cost of publication was less than $75.00. The amount agreed to be paid therefor, under the arrangement made by the Secretary, and which was actually paid, was nearly $1800.00. *Held* that the contract was void, not only as tending to extravagance and waste in the use of the public moneys, but to debauch the public press, and jeopardize our public institutions.

The court expresses regret that it is unable, in this action, to require the defendant to return to the public treasury the entire sum which he received under the scandalous and illegal agreement, and call the attention of the general assembly to the crying need for legislation which will prohibit the repetition of like misconduct by public officials, with suitable penalties for the infraction of such regulations.—*Id.*

Complaint Not Disclosing Illegality.—The rule that if the complaint fails to disclose illegality in the transaction upon which the plaintiff relies, or if the plaintiff does not require the aid of such transaction, the defendant is not allowed to set up an illegal agreement or consideration, to which he was party, is not the law in this jurisdiction.

Illegality appearing in the evidence is fatal, whether coming from one side or the other.—*Id.*

Consideration.—A widow's waiver of her right to make formal protest against the appointment of a particular person as administrator upon her deceased husband's estate, is a consideration for the agreement of the administrator to serve without compensation.—*Fogg v. Quackenbush*, 482.

Construction.—The conduct of the parties, subsequent to their engagement, is to be considered in its interpretation.—*Sorrells v. Sigel-Campion Co.*, 154.

CONTRACTS—Continued.

The contracts of surety companies are construed like other contracts. The rule that the contract of a surety is *strictissimi juris* has no application. —*Curry v. Equitable Co.*, 175.

Construed.—Defendant employed plaintiff to find a purchaser for certain lands, live stock, and other chattels. Plaintiff produced purchasers with whom defendant entered into a contract to the effect that the purchasers should take possession and manage the properties, with power to sell the personalty, and, when paid a certain sum, defendant would convey an undivided interest, etc. Of the same date defendant executed a writing certifying that there was due plaintiff a sum specified, as commissions under this contract, payable at a certain rate per cent upon all sums which he should receive, etc., and "whenever said contract is canceled, or waived by me, I agree to pay any unpaid balance due." Defendant afterwards released the purchasers. *Held* that the whole commission became at once due and payable.—*Starbird v. Davis*, 467.

Resolution of School Board Construed as.—The vote of a school board to employ a teacher named is not an employment, if the circumstances show no intention to contract.

Plaintiff and another were applicants for the position of principal to defendant's high school. Plaintiff received the votes of three out of the five members of the board, and the secretary was directed to notify him that he had been appointed. Previous to this meeting of the board plaintiff had conversed with one of the members, and in this conversation it was understood that the salary was twelve hundred dollars, and it appeared that the salary had been fixed at that sum and paid for the two previous years. *Held*, sufficient to warrant a finding that plaintiff was employed at the salary mentioned.—*Ryan v. Mineral High School District*, 63.

A ranch owner, a part of whose business was the feeding and caring for the live stock of others, leased to a flock master certain pasturage upon his ranch, and the flockmaster agreed to feed 2,000 sheep on the ranch. *Held* an agreement to deliver upon the ranch the specified number of sheep to be fed and cared for by the owner of the ranch.—*Sorrells v. Sigel-Campion Co.*, 154.

Of even date with a promissory note, an agreement was framed to the effect that dividends accruing to the maker upon a share of stock in the corporation named as payee, should be applied upon the note, and that "if said dividends shall not have fully paid said note at maturity, the same may be extended for one year." *Held*, that the note was not automatically extended by a deficiency in the dividends to discharge it.—*George v. Williams*, 400.

Promissory Notes—Subscribed by Officers of a Corporation, with Their Title Affixed, following the name of the corporation, and bearing the corporate seal, construed to be the undertaking of the corporation alone, although in the body of the note the makers were described by the words, "I, we, and each of us," and though there was no preposition following the corporate name.—*New England Co. v. Shook*, 30.

CONTRACTS—Continued.

A contract between one Vickery and the Surveyor General for the survey by Vickery of certain public lands, provided, among other things, that the contractor should conform to the printed Manual of Surveying Instructions, and other instructions issued by the Commissioner of the General Land Office, and with "such special instructions" as he might receive from the surveyor general and such manual and instructions, should be considered as part of such contract. *Held,* that though the contract prescribed a time within which the survey should be completed, the contractor was affected by instructions from the surveyor general not to commence work until a base line and principal meridian should be established by another surveyor. *Held,* further, that Vickery's surveys, having been rejected by the surveyor general, plaintiff, the surety in his bond for the performance of his contract, having, pursuant to the provisions of the manual, procured another surveyor to complete and correct them, Vickery and his sureties in a indemnifying bond given plaintiff, were liable for the expense of such correction.—*American Co. v. Vickery,* 96.

Representation to Obtain Credit.—Husband and wife, to obtain credit at a bank, made and delivered what was therein described as "A true and correct statement of all their assets and liabilities." Among other items was set down a farm of 160 acres in Otero County, valued at $12,000. Certain shares in the stock of an irrigating company were standing in the name of the wife, and by means of this holding water was obtained for the irrigation of the land. The shares were not expressly mentioned in the statement. The lands without water were of little value. On the face of this statement the bank advanced money to the two, on the individual note of the husband, and the money was checked out by both husband and wife at pleasure. *Held,* that the shares in the irrigating company were intended to be included in the statement, and were liable to the execution of the bank, issued upon a judgment recovered against the husband alone for the loan.—*Wood v. Yant,* 189.

Waiver of Condition.—One having contracted with the surveyor general to make certain public surveys, but only upon first receiving official notice of the approval of his contract, commences and proceeds with the work without such notice; he waives the right to insist upon the specified notice. —*American Co. v. Vickery,* 96.

In the same case, a time limit for the completion of the survey was set down in the contract of the surveyor, one Vickery; but, as permitted by its terms, the surveyor general, before the commencement of the survey, directed the surveyor not to proceed until a base-line and principal meridian should be established, and informed him that if he should be unable to comply with his contract in point of time, he should apply for an extension of the time limit, and this direction to the surveyor was repeated verbally and by letter at later dates. Vickery was further notified by the surveyor general, before commencing the survey, that if he should then begin work, prior to the establishment of the base-line and meridian, he would do so at his own risk. *Held,* a waiver on the part of the government of the time limit specified.—*Id.,* 96.

CONVEYANCES.

Recitals of Consideration Paid.—The recital, in the conveyance of land, of the consideration paid, is only *prima facie* evidence, and may be contradicted. Action against the surety of a contractor for the erection of a building, its liability being limited at $1,750.00. The contractor had conveyed the premises whereon the building was to be erected to the other party to the contract, the plaintiff in the action, by a deed reciting the payment of $1,750.00 as the consideration. The surety contended that the deed showed, in effect, that plaintiff had received from the contractor the amount so recited as full payment of the damage sustained by the non-performance of the contract. But the evidence showed that the sum recited in the conveyance was in fact the estimated value of certain premises theretofore conveyed by plaintiff to the contractor, that the premises conveyed by the deed were subject to encumbrances, exceeding the full value of the land with all improvements, and that the conveyance was not intended by the parties as a satisfaction of plaintiff's damages. Defendant's contention was therefore rejected.—*Equitable Co. v. Conners*, 213.

Acknowledgment.—A certificate appended to a tax deed declared that "personally appeared," etc., one known to the officer granting the certificate to be treasurer of the county, and "the identical person who executed the conveyance,"—not in any manner declaring any knowledgmeent by the person so appearing. The certificate was held a nullity.

And its defects not cured by any presumption arising from lapse of time.—*Minter v. King*, 233.

Of Premises Abutting on a Water Course.—The proprietor of lands bounded by a water course may restrict a conveyance of such lands to specified limits, reserving the water course, and any right in the frontage thereon; and when anything appears to indicate such intention in a conveyance of the premises, such intention will prevail over any presumption carrying the conveyance to the thread of the stream.

The probate judge holding title to the townsite of Denver, in trust for the occupants, made a conveyance as such trustee, to a lot bounded on Cherry Creek. On the same day he conveyed to the city the whole bed of Cherry Creek not theretofore conveyed. *Held* to manifest an intention to separate the ownership of the bed of the stream from the ownership of the lot, and to overcome any presumption which might otherwise be indulged that the conveyance of the lot carried title to the center of the stream.—*Eisenhart v. Denver*, 470.

Construction.—In construing a conveyance of a lot in a townsite, reference may be made not only to the history of the title as appears in the conveyances, and the other evidence contained in the record, but to the statutes relating to the townsite at the date of the conveyance.

In construing a deed from the probate judge, holding title to the townsie of Denver in trust for the occupants, it was assumed that such probate judge had notice that only a particular survey and map of the townsite was of record in the office of the recorder of the county, and of the purpose and efforts of the city authorities, and the people of the territory, to control the bed of a certain stream within the townsite, and that he was influenced

CONVEYANCES—Continued.
thereby in passing upon the proofs of occupancy by the claimant of a lot, and in the conveyance executed pursuant to such claim.

Where there are conflicting surveys and maps of a townsite, an express reference to one of these, in a conveyance of a lot in such townsite controls, and limits and restricts all subsequent conveyances in the same chain of title to the bounds and dimensions set down in such map.—*Eisenhart v. Denver*, 470.

Convenant of Seizin, in a conveyance of lands, imports that the grantor is in possession, and that the grantee shall succeed to such possession. If there is in fact an adverse possession of even a part of the premises, the covenant is broken as soon as made, and the grantee is entitled to an action against the grantor for the reasonable expense of expelling the intruder.

That the conveyance contains, also, a covenant to warrant the title, against all "lawful claims," has not the effect to impair his right of action. —*Stearns v. Jewel*, 390.

Disseizin—Possesion by Mistake of Boundary, by one not claiming title, is not adverse. The title in such case draws to it the possession. The possession by mistake is no breach of a covenant of seizin in the conveyance of the true owner.

And the subsequent refusal of possession, by the one so in actual possession, has not the effect to give an action upon the covenant. To effect a breach of the covenant there must be an adverse possession at the date of the conveyance.—*Id.*

Covenant of Warranty, against "all lawful claims" is not broken by an unlawful possession then existing.—*Stearns v. Jewel*, 390.

COPORATIONS.

Articles of Association Construed.—A corporation was organized to acquire an extensive mountain park in the neighborhood of a summer resort; to construct private roads thereto from the public highways leading to the resort, and acquire the rights necessary therefor; and operate vehicles over the same. These powers were held sufficiently broad to entitle the corporation to avail itself of sec. 2461 of the Revised Statutes.—*Crystal Park Co. v. Morton*, 74.

Title Not Indicating the Business to Be Carried On, as required by the statute (Rev. Stat., sec. 846), is still a corporation *de facto*, and may exercise the power of eminent domain.—*Crystal Park Co. v. Morton*, 74.

Stockholders—Right to Vote.—A merely nominal owner of the stock of a corporation is entitled to vote thereon.—*Creighton v. Campbell*, 120.

Directors, Officers.—The statute (Rev. Stat., secs. 852, 865), distinguishes between directors who are elected by the stockholders and officers who are elected or appointd by the directors. Of the officers only the president is required to be a director.—*Creighton v. Campbell*, 120.

Liability of Stockholder for Corporate Debts.—One who in good faith, purchases from the corporation, at less than par, shares of its stock originally full paid, is not liable to creditors of the corporation for the difference between the par value and what he paid.—*Henry v. Semonian*, 487.

CORPORATIONS—Continued.

Stock—Full Payment Presumed.—It is presumed, nothing to the contrary appearing, that in its original issue the stock of a corporation is paid in full.—*Id.*

Creditor's Action Against Stockholder—Burden of Proof.—In the action of a creditor of the corporation against a stockholder the burden of proof is upon the plaintiff to establish that the stock held by the defendant is not full paid.—*Id.*

Transfer of Stock by Deed.—Corporate stock, though personalty, may be effectually transferred by deed. The statute providing that it shall be transferred upon the books of the corporation, is for the protection of innocent purchasers. As between the parties, and all taking with notice, a transfer by deed is effectual.

A mortgage of lands, after the description thereof, contained a clause to the effect that all ditch and water rights and stock in an irrigating company named, was also conveyed. One having notice of the mortgage, and of the stock there referred to, procured a certificate for such stock to be issued to himself, by a fraud practiced upon the officers of the corporation. *Held* that the stock was subject to the mortgage.—*Thompson v. Rowe*, 361.

Execution Sale of Shares—Effect.—It seems that one who purchases the shares of a stockholder at a valid execution sale thereof, may, by application to a court of equity, the stockholder being impleaded, require the corporation to transfer the shares to him, upon its books, though the former stockholder retains the original certificate.—*Wood v. Yant*, 189.

COUNTIES.

Not Liable for the Repair of Highway Bridges within Towns and Cities.—A county is not chargeable with the expense of repairing a bridge which is part of a public highway of the county, but, within the limits of an incorporated town or city.

The provision of Rev. Stat., sec. 6577, which assumes to impose this liability, is without effect, because not referred to in the title of the enactment. *Nelson v. Garfield County*, 6 Colo. Ap., 279, followed.—*Trinidad v. Las Animas County*, 207.

Contingent Fund.—The expense of an examination of the books of the county officers, not contemplated at the date of the annual appropriation, may properly be discharged from the Contingent Fund.—*Gunnison County v. Davis*, 501.

County Commissioners—Powers.—Within the scope of their powers the Board of County Commissioners are supreme. They cannot be superseded, nor can their acts be judicially controlled or reviewed, except for an excess of jurisdiction or abuse of discretion.—*Gunnison County v. Davis*, 501.

Implied Powers.—The Board of County Commissioners possess such implied powers as are reasonably necessary to the efficient exercise of those powers and duties which are conferred and imposed upon them by the express words of the statute. Where a specific duty is declared the power to employ such agencies as are reasonably necessary to effectually perform that duty is granted by implication, unless by statute the board is expressly limited to specific means and agencies.—*Id.*

COUNTIES—Continued.

Duties Compulsory.—The board cannot shift its powers to another, nor evade responsibility for its declared duties.—*Id.*

Audit of Public Accounts.—The board being expressly charged with the duty of auditing, correcting and adjusting the accounts of county officers, and not being limited to any specific means or agencies, have implied power to employ an accountant to make the audit.

The power is not taken away by the Public Examiner's act (Laws 1909, c. 192, Mills Stat., sec. 131).—*Id.*

The board have no control of the public examiner, no authority to direct an audit by him of the books of a county officer, and is not charged with notice of his report when made.

Necessity for Expert Audit.—That an examination of the books of the treasurer has been made by a committee appointed by the District Court, and of the accounts of other officers, by the Public Examiner, is no ground to deny the power of the County Commissioners. Where it appears that no audit has been made by an expert, for many years, that the report of the Public Examiner was incomplete and unintelligible, that the Treasurer and Recorder had refused to allow an examination of their books, and that the tax-payer seeking to restrain the examination is a near relative of one the officers, *held* to sufficiently evidence the advisability of an expert examination, even if any evidence, beyond the action of the board, were necessary. —*Id.*

COVENANTS FOR TITLE.

See CONVEYANCES.

DAMAGES.

Proximate Cause.—The complaint alleged that defendant, an attorney, employed plaintiff to audit the books of a cigar company, not to ascertain the company's condition, but with the secret purpose, concealed from plaintiff, to found upon plaintiff's report a criminal accusation against the manager of the company, and to use plaintiff in the prosecution of such accusation; that plaintiff having made a report of his examination, defendant, by means thereof, induced the district attorney to procure an indictment against the manager, and appearing for the people at the trial of such indictment, so conducted himself as to cause the accused manager to believe that plaintiff had instigated the prosecution; that in this belief the manager, being acquitted of the charge laid against him, instituted against plaintiff an action for malicious prosecution; that plaintiff defeated such action, but expended $1,000 in the defense thereof, which he demanded of defendant. *Held*, that the misconceived action of the manager was the direct and proximate cause of plaintiff's loss, and was not the natural consequence of what was alleged against defendant.—*Geijsbeek v. Martin*, 316.

Exemplary.—Under the statute (Rev. Stat., sec. 2067), to warrant the allowance of exemplary damages there must be an element of fraud, malice, evil intent, or oppression in the act complained of. Mortgage of a desk and other office furniture. The mortgage being overdue, after many extensions and repeated demands of payment, subsequent to maturity, the mortgagee went to the office of the mortgagor and in the latter's absence by

DAMAGES—Continued.
mistake left in the office the desk described in the mortgage, taking away another and different desk. There was evidence that he had been told by the mortgagor that the desk so taken was included in the mortgage. *Held*, that the mistake in the article taken, and the inconvenience occasioned to the mortgagor by being deprived of the papers contained in the desk, for a few days, afforded no warrant for an allowance of exemplary damages, and that it was error to submit that question to the jury.—*Moody v. Sindlinger*, 290.

Measure—Duty of Court to Instruct As To.—Where a definite rule as to the measure of damages can be given, it is error not to instruct the jury as to such rule.—*Creighton v. Campbell*, 120.

Action for Refusal of Corporate Stock, to which plaintiff is entitled. The measure of damages is the value of the stock.—*Id.*, 120.

Action for Deceit Inducing the Purchase of Coroprate Stock.—The measure of damages is the difference between the actual value and what it would have been worth if the representations had been true.—*Id.*, 120

Stockholders' Interest in Corporation—Value Of—How Measured.—The value of the stockholders' interest in the corporation is his proportion, measured by his holding in the stock, of the net assets of the corporation after the discharge of its liabilities.—*Id.*, 120.

Growing Crops Destroyed.—The measure of damages for the destruction, total or partial, of growing crops, is not what it would cost to raise them, to their condition at the time of loss, or to maturity; but, in the case of annuals, the value thereof immediately before the loss.

The jury should be directed to ascertain the condition of the crop at the time of the loss, what in the ordinary course of things, it would, at maturity, have produced in the market, by the exercise of ordinary care in maturing, harvesting, and marketing; they should be directed to take into account the average yield of like crops, on similar land, in the same season and locality, and to deduct from the market value thus ascertained the ordinary and reasonable expense of maturing, harvesting and marketing.

Where the action is by the tenant against the landlord, the rent reserved being in kind, the verdict should be diminished, proportionately to the share of the landlord.—*Roberts v. Lehl*, 351.

Growing Crops Injured but Not Destroyed.—The measure of damages for an injury to an annual crop, not totally destroyed, is the difference between its value immediately before the injury, and immediately thereafter. In ascertaining the future value of the injured crop, the attention of the jury should be directed to the same considerations as in the case of a total loss.—*Id.*

Landlord's Failure to Furnish Water.—Where, the lands being arid and irrigation necessary to their cultivation, the landlord fails to provide water thereof, according to his covenant, the tenant is not to plant a crop, depending on the uncertain coming of rain. He is not to assum this risk, and afterwards call upon the landlord to make good the aggravation of his damages, thus occasioned. The measure of his damage in such case is the

DAMAGES—Continued.
difference between the rental value of the land, with water and without it.—*Id.*

Pleading as to.—A school teacher who being wrongfully discharged before the lapse of the term of her employment, obtains a position in another locality is entitled to an allowance for expenses reasonably incurred in seeking the new position, and for an increase in his expenses occasioned by the removal, without pleading it.—*School District v. Nash,* 551.

But if he would recover the expense of removing his family, it must be pleaded.—*Id.*

Duty of Plaintiff to Minimize.—One whose papers have wrongfully been taken from him is under duty to accept the offer of the wrong-doer to return them. He is not permitted to aggravate his damages by declining the offer.—*Moody v.Sindlinger,* 290.

Action by tenant against landlord for the loss of a part of his crop, and injury to the residue, by the landlord's failure to provide water for the irrigation of the land, according to his covenant. There being evidence that by an expenditure of $15.00 as to one source of supply, and the payment of the water tax, as to another, the tenant might have averted the loss, it was said that if it should clearly appear, upon a second trial, that it was reasonably within the tenant's power to avoid the loss, he should be allowed only the amount necessary to be thus expended.—*Roberts v. Lehl,* 351.

DECEIT.

False Representations as to the Future.—A representation which is in effect a promise to be performed in the future will not sustain an action for deceit.—*Creighton v. Campbell,* 120.

Frauds of Another afford no action. Nothing short of actual participation in the frauds complained of suffices to charge the defendant.—*Id.* 120.

As to Legal Effect of a Document, of which the party complaining has the same opportunity to judge, as the party making the representation, and as to which there is time to investigate, and take counsel, afford no action.—*Peden v. Birkle,* 323.

False Representations Made at the Instance of Another, and without knowledge of the facts on the part of the one making them, do not estop him to assert their falsity, as against the person at whose instance the representations are made.—*Howard v. Mitchell,* 45.

DEEDS.

See CONVEYANCES.

DEFAULT.

Motion to Vacate is in the discretion of the court, *Miller v. Houston,* 89.

DENVER.

Boyd Survey—Ebert Survey.—The probate judge of Arapahoe County, acting as trustee for the occupants of the townsite of Denver, executed a conveyance of a lot bounded upon Cherry Creek, not referring to any map or plat for the description. The only map then upon record in the office

DENVER—Continued.
of the recorder of the county was that of Ebert's Survey. The contrary not being shown, it was held that the conveyance must be construed to refer to the only map so of record.—*Eisenhart v. Denver*, 470.
DISTRICT COURT.
Jurisdiction.—No statute assumes to deprive the District Court of its jurisdiction over actions against the personal representative for a deceit practiced by the decedent in his life-time. The repeal of Gen. Stat., secs. 3617, 3618, had not this effect.—*Selkregg v. Thomas*, 259.
DIVORCE.
Review—State as Party.—The parties were married upon an acquaintance of ten days, the lady being then of the age of 34 and the groom past 60. At the end of six months she sued for a divorce, demanding counsel fees, temporary alimony, and fifteen thousand dollars as permanent alimony. The husband filed a cross-complaint. Both parties alleged cruelty. Verdict for defendant, and decree accordingly. No errors having occurred during the trial, and the evidence being sufficient to support the verdict, the court, notwithstanding the public interest, declined to disturb the judgment.—*Trull v. Trull*, 109.
EMINENT DOMAIN.
Way of Necessity, at common law is an easement implied when one grants land separated from the public highway by land which he retains, and is grounded upon the maxim that every grant includes that without which the grant will be without effect.
The grant, and not the necessity, creates the right.
But considering that the taking of such a way would not be a taking without the consent of the owner, because consent is conclusively presumed in every such case, and that such taking would not require the payment of compensation, it was *held* impossible to conclude that the phrase is used in this limited sense in the constitution. (Art. II, sec. 14.)
The private ways referred to in the constitution are such as are indispensable to the enjoyment of the lands in respect to which the way is claimed; and they are not limited to ways desired for agricultural, mining, milling, domestic or sanitary purposes, as are those for reservoirs, drains, flumes and ditches.—*Crystal Park Co. v. Morton*, 74.
The Necessity for the Court.—The courts may determine what constitutes a private way of necessity, in any particular case, unless restrained by the legislature. Where the petition showed that petitioner had acquired title to a mountain park in the vicinity of a summer resort, one of the principal attractions to such resort, and that by reason of the conformation of the country the only feasible and practicable way to gain access thereto was over the lands of respondent, *held* that these averments brought the case within the statute.—*Id.*, 74.
EQUITY.
Reformation of Writings—Evidence Required.—The evidence of a mutual mistake in a conveyance of lands, executed with due form and solemnity, must be clear, convincing, and free from reasonable doubt.

EMINENT DOMAIN—Continued.

The evidence examined and held to be insufficient to establish the alleged mistake.—*Jones v. Dappen*, 21.

Trial—Jury.—In causes in equity the court may direct a verdict, even where the evidence is conflicting; or may discharge the jury, and decree upon its own findings. Its authority is unquestionable.—*Continental Co. v. Knight*, 257.

Decree—Relief.—A writing may be reformed and judgment given thereon in the same action.—*Jones v. Dappen*, 21.

ESTOPPEL.

By Record.—One who has admitted in his pleadings that a promissory note is the note of the corporation, the name of which is subscribed thereto, will not be heard to afterwards assert in the same action that the officers of the corporation subscribing it acted without authority and are therefore personally liable thereon.—*New England Co. v. Shook*, 30.

By Conduct.—One who, while a director of a private corporation, acquiesces in the assumption of the same position by another, knowing that he is not qualified by his holding of stock, is estopped to subsequently complain of such action by the disqualified person.—*Creighton v. Campbell*, 120.

EVIDENCE.

Presumptions.—Lapse of time has not the effect to raise the presumption of the acknowledgment of a conveyance of land, from the appearance, appended thereto, of an official certificate that the grantor personally appeared before the officer granting the certificate, without more.—*Minter v. King*, 233.

The settlement of an action by the defendant therein raises no presumption that the demand was a just one.—*Fulton Co. v. Smith*, 279.

Judicial Notice taken that where land and water are united in use, the value of the land is often spoken of, and intended to be understood, as including the value of both.—*Wood v. Yant*, 189.

And the character of a certain stream, and the devastation and damage occasioned by it, in seasons of flood.—*Eisenhart v. Denver*, 470.

And that in most counties, substantial sums should remain to the credit of the General Fund.—*Gunnison County v. Davis*, 501.

And that county officers are not always competent or faithful, and that some are guilty of speculation and embezzlement.—*Id.*

And that County Commissioners are not generally expert accounts.—*Id.*

Burden of Proof—It seems that whoever assails a conveyance, as accepted with notice of the rights of another, or with notice of a fraudulent intent on the part of the grantor in such conveyance, has the burden of proving these allegations.—*Newman v. Tibbitts*, 325.

In an action upon the covenant of seizin, where an adverse possession is alleged and denied, the plaintiff has the burden of proving the possession alleged, and that it was adverse.—*Stearns v. Jewel*, 390.

In the action of a corporate creditor against a stockholder under the statute (Rev. Stat. sec. 873), plaintiff has the burden of showing that the defendant's stock is not full paid.—*Henry v. Semonian*, 487.

EVIDENCE—Continued.

One who asserts title to a mining claim, by relocation, upon allegation of non-performance by the original locator of the annual labor required by the statute, has the burden of showing such non-performance.—*Lancaster v. Coale*, 495.

Shifting Burden of Proof.—When the owner of an animal bailed to an agister shows the bailment, demand, and failure to return, he establishes a *prima facie* case against the agister.

If the latter, under proper pleadings, shows the escape of the animal in a manner which dispels every inference of negligence on his part, the burden shifts to the plaintiff to establish negligence.—*Herbert v. Patrick*, 204.

Competency—Letters of Third Person, are not admissible to establish a promise therein stated to have been made by defendant.—*Young v. United States Co.*, 331.

Letters of Party.—The administrator of an attorney brought his action to recover of defendants the fee of the attorney for defending their nephew upon a criminal charge. The unsigned copy of a letter, found in the letter file of the attorney, addressed to one of the defendants, and demanding payment of the bill, but not shown to have been mailed to or received by the defendant, held not admissible.—*Id.*

Account Books of Party.—The account books of an attorney charging a person named with the attorney's fee for defending a third person under a criminal charge, is not admissible to establish the amount of the fee, or the value of the service, where there is no independent, competent evidence to show the attorney's employment by such third person, and that fact is in issue.—*Young v. United States Co.*, 331.

Official Documents.—A contract for the survey of certain public lands provided that the work should not be commenced until the contractor should be notified by the surevyor general of the approval of his contract. A letter of the surveyor general to the contractor *held* to establish the required notification.—*American Co. v. Vickery*, 96.

The question being as to the date of maturity of a chattel mortgage, subsequent to an extension, oral testimony of the mortgagor as to a conversation with the agent of the mortgagee, rejected, as insufficient to overthrow the record of the extension, as it appeared in the office of the recorder.—*Moody v. Sindlinger*, 290.

Admissions—By Silence.—A letter written by one of defendants to plaintiff, shortly before defendants abandoned the store-room, stating that defendants had purchased a building and were removing thereto, but making no allusion to the supposed insecurity of the store-room, was held properly admitted.—*Post v. Lang*, 225.

The testimony of one party not contradicted by an adversary is admitted.—*Starbird v. Davis*, 467.

Admissions—Effect.—Defendant's admission, at the opening of the trial, that his defense is purely equitable, is, *prima facie*, an abandonment of the general denial.—*Coe and Stedman Co. v. Coryell*, 61.

Parol Admissible, to show the real intent of the parties to a written contract, where upon its face an uncertainty as to such intent appears,

EVIDENCE—Continued.

e. g., where following the name of a corporation, affixed to a promissory note appear the names of the president and secretary, followed by their respective titles.—*New England Co. v. Shook*, 30.

Parol admissible, in an action upon a promissiory note, to show that it was delivered for a special purpose.—*Divine v. Western Slope Association*, 368.

And to show an agreement, contemporary with the execution of a promissory note, as to the manner in which it should be paid, the action being by an assignee who took subsequent to maturity.—*George v. Williams*, 400.

Evpert Opinions—Competency.—Landlord's action for rent of a storehouse. The tenants had abandoned the premises, because, as they alleged, of the unsafe condition of the foundation walls, attributed to a flood which filled the basement. The opinions of architects, builders and building inspectors, based upon examination made at periods of from three to nineteen months subsequent to the flood, were held properly admitted, *Post v. Lang*, 225.

Measure of Proof.—The plaintiff must produce a fair preponderance of evidence upon every question of fact involved in the issues.—*Fraternal Association v. Collier*, 245.

To show a common law marriage the evidence must be clear consistent and convincing.—*Peery v. Peery*, 533.

So, of the evidence to establish fraud.—*Morrison v. McCluer*, 264.

Witness—Competency.—One who is not a party to an action against an executor is not disqualified as a witness for the plaintiff by the mere fact that he may be, himself, relieved of liability by a judgment against the executor. He is not "directly interested," within the meaning of the statute. (Rev. Stat., sec. 7267.)—*Selkregg v. Thomas*, 259.

In an adverse suit against the devisee of a decedent, the plaintiffs are not competent to testify in their own behalf. (Rev. Stat., sec. 7267, Laws 1911, c. 229, sec. 1.)—*Lancaster v. Coale*, 495.

EXECUTION.

Against the Body.—Where there is no evidence of malice, fraud or wilful deceit it is error to award execution against the body.—*Moody v. Sindlinger*, 290.

Under Rev. Stat., secs. 3024, 3025, no execution can go against the body unless, (1) the jury by their verdict declare that the defendant was guilty of fraud or wilful deceit, nor (2) unless the court has entered upon its docket the term for which the defendant may be committed.—*Howard v. Mitchell*, 45.

Sale—Redemption.—In the absence of a statute neither the debtor, his grantee, nor his creditor, is entitled to redeem from an execution sale of land.—*Jenkins v. Gold Dollar Co.*, 247.

Redemption—Mortgagee's Right.—A mortgagee of lands may discharge a judgment which is senior to his mortgage, and be subrogated in equity to the right of the judgment creditor.—*Jenkins v. Gold Dollar Co.*, 247.

If entitled to redeem from a sale of the lands under such prior judgment, which is not decided, he must not delay until a junior judgment creditor, by redemption, and a sale pursuant thereto, has succeeded to the rights

EXECUTION—Continued.
of the creditor in the senior judgment (Rev. Stat., secs. 3653, 3654).—*Id.*

Sheriff's Deed, upon redemption sale, made by a judgment creditor, relates to the lien of the prior judgment, and supersedes an intervening mortgage.

The court recommends an amendment to the statute, to the effect that all liens upon real estate shall be paid according to their priority of record. —*Jenkins v. Gold Dollar Co.*, 247.

What Is Acquired by the Purchaser.—Where the circumstances are such that a judgment creditor is entitled to subject particular chattels to execution for the satisfaction of his judgment, any purchaser at the execution sale succeeds to this right.—*Wood v. Yant*, 189.

EXECUTORS AND ADMINSTRATORS.

What Actions Survive.—An action to recover money obtained by a decedent, by means of false representations, is *ex contractu*, and survives against his personal representative.—*Selkregg v. Thomas*, 259.

Liability for Interest.—An administrator who, in all things, has acted in good faith, has not used the funds of the estate, or received any profit therefrom, has made prompt report of his actings and doings in his official capacity, and moved for an order permitting final settlement and distribution, as soon as that was possible, is not to be charged with interest, upon the moneys in his hands during administration.—*Fogg v. Quackenbush*, 480.

Administration—Presentation of Claims.—Defendants had taken up at the bank a note of their father, giving in lieu thereof their own note, which they afterwards paid. Upon the decease of the father, defendants, by request of all interested parties, assumed possession of the properties pertaining to his estate, and managed the same for several years. The will of the father being afterwards admitted to probate, and another being appointed administrator with the will annexed, defendants were ordered by the County Court to file an account of their administration while managing the estate. Their account, filed in compliance with this order, was approved by the County Court. On appeal, the District Court disallowed so much of their account as related to the note of the father which they had paid to the bank, solely upon the ground that the note of the father had not been presented to the County Court for payment within the period of one year. *Held*, that inasmuch as the note of the father had already been discharged it could not be presented for payment, and the account of the defendants having been presented within the year following the appointment of the administrator, the statute was satisfied.—*Conant v. Machen*, 310.

FORFEITURE.

One Assuming to Declare, Must be Able to Perform on His Own Part.—Plaintiff held the promissory note of the Newmans secured by deed of trust of lands. Default having been made in the payment of interest, an agreement was entered into extending the time therefor, and providing that if the conditions thereof were not performed by defendants, by a date specified, upon the forfeiture so resulting a warranty deed of defendants reconveying the premises, and then deposited in escrow, should be delivered

FORFEITURE—Continued.
to plaintiff in full satisfaction of defendants' promissory note. Defendants failed in the performance of the conditions of this agreement, and conveyed the premises to a third party. The deed of defendants, so deposited in escrow, had been delivered to plaintiff. Plaintiff prayed confirmation of this conveyance, the annulment of the deed of defendants to the third party, and possession of the lands. It appearing that plaintiff had sold and assigned the note of defendants to a third person, it was held that he had thereby disabled himself to perform his undertaking in respect thereto and for this, among other reasons, was not entitled to the relief prayed.—*Newman v. Tibbitts*, 325.

FRAUD.

A Secret Purpose in Employing One to do a Lawful Act, in a lawful manner, is not a fraud upon the person employed.—*Geijsbeek v. Martin*, 316.

Evidence to Establish, must be clear and convincing.—*Morrison v. McCluer*, 264.

Burden of Proof, rests upon the one charging fraud.—*Id.*

Mortgagor and Mortgagee.—A mortgagee is not affected by a fraudulent purpose in the mind of the mortgagor, in which he is not participating.—*Morrison v. McCluer*, 264.

See DECEIT.

FRAUDULENT CONVEYANCES.

Voluntary—Subsequent Creditors.—A voluntary conveyance, without consideration, is not presumptively fraudulent as to a subsequent creditor. The subsequent creditor assailing it must show fraudulent intent on the part of the grantor therein.

So, of one to whom the voluntary grantor becomes liable for a tort committed subsequent to the conveyance.

The mere pendency of a suit by a third person against the grantor and others, for an alleged tort, is not sufficient proof of a valid debt or claim, although the suit is subsequently settled by the grantor's co-defendant without defendant's knowledge or consent.

Competent proof of the verity and legality of the claim asserted in such suit must be produced.

The evidence examined and held not sufficient to sustain the allegation of fraudulent intent in the conveyance.—*Fulton Co. v. Smith*, 279.

Evidence.—The evidence of actual intent to defraud an alleged prior creditor must be so clear and indubitable as to exclude the presumption of good faith, or fail to sustain an allegation of fraud of which a subsequent creditor can take advantage.—*Id.*

Conveyance to a Corporation for its Stock, is sanctioned by statute, and is not voluntary or without consideration.—*Id.*

Trust for Benefit of Grantor.—Section 2665 of the Revised Statutes applies only to transfers of chattel property, and avoids these only as to existing creditors..—*Id.*

Presumptions.—The settlement of an action by the defendant, of itself raises no presumption that the demand asserted therein is a just one.—*Id.*

HUSBAND AND WIFE.

Wife's Separate Property is subject to the husband's debts where, with her knowledge and consent, he is permitted to deal with it as his own, and thereby obtain credit.—*Wood v. Yant*, 189.

INFANTS.

Custody—Every child is under the control of the state. In disposing of the custody of a child, the paramount consideration is the child's welfare, to which even the paternal right must yield.

The statute confers upon the guardian no greater right to the custody of his ward than had the parent at common law.

The issuance of letters of guardianship on *ex parte* application is not such an adjudication as to conclude the courts from depriving the guardian of the custody of the ward.—*People v. Bolton*, 39.

Religious Training.—Notwithstanding the provisions of the statute (Rev. Stat. secs. 559, 2912-2914, Laws 1913, 694)), the wishes of the parent as to the religious training of the child are subordinated to the controlling consideration of the child's welfare.—*People v. Bolton*, 39.

INSTRUCTIONS.

Abstract Error in will not reverse unless it apears probable that the jury was misled to the prejudice of the party complaining; and, as a general rule, this can only be determined by a view of the evidence.—*Nelson v. Nelson*, 104.

Construed.—Action by a pedestrian for an injury attributed to the reckless management of the street car of defendant, at a street crossing. The defense was the contributory negligence of plaintiff in attempting to pass the tracks, without looking in either direction. Defendant prayed an instruction to the effect that it was the duty of the pedestrian, in such case, to look out for himself, and exercise such care as a reasonably prudent person would exercise, under the same circumstances, and that if plaintiff failed to exercise this degree of care, they should find for defendant. To this the court added the words, "upon this question." The modification was not held misleading.—*Colorado Springs Co. v. Merrill*, 382.

To be Considered as a Whole.—An instruction merely defective, incomplete, or ambiguous, or which leaves room for improper inferences, may be cured by another point in the charge.—*Nelson v. Nelson*, 104.

Instructions given, fairly including the doctrine of those refused, toll the error.—*Post v. Lang*, 225.

False Statement of the Pleadings, prejudicial to a party, is error.—*Creighton v. Campbell*, 120.

False Statement of the Evidence.—An instruction which impliedly assumes the existence of evidence which was not given is error.—*Id.*, 120.

In Actions Founded Upon a Statute, an instruction is generally proper if it fairly follows the language of the statute, *e. g.*, in an action under Rev. Stat., secs. 3233, 3238, for an injury to plaintiff's premises by seepage from defendant's ditch, attributed to negligence in the construction, maintenance and operation thereof, an instruction that defendant was "under duty to keep its ditch in good condition, maintain its embankments in good repair, and prevent water wasting therefrom," was approved.—*Beaver Creek Co. v. Elling*, 252.

IRRIGATION.

Seepage—Injuries From—Evidence.—Action for an injury to plaintiff's premises alleged to have been occasioned by seepage from defendant's ditch. Evidence held sufficient to sustain a recovery by plaintiff.—*Beaver Creek Co. v. Elling*, 252.

JUDGMENT.

Presumptions.—Plaintiff contesting the right of defendant to vote certain shares in a corporation which had theretofore been issued to one Hitchcock and by him transferred to defendant, the jury were instructed that if defendant, at the time of the transfer, knew that the stock had not been paid for by Hitchcock, and knew also of certain frauds perpetrated upon pliantiff and the corporation by Hitchcock, defendant's claim of ownership of the shares would be evidence of fraud on the part of defendant. It appearing that in a former action in which the parties to the present suit, or their privies, were parties, upon the same allegations as to the shares, and the assignment thereof by Hitchcock, judgment had been rendered against Hitchcock and in favor of the corporation for $24,000.00, not declaring either the original issue of the shares nor the assignment thereof invalid, *held* it must be presumed that this judgment settled all issues, and left the stock outstanding in the hands of defendant as assignee of Hitchcock, to the extent, at least, that defendant was entitled to vote said shares.—*Creighton v. Campbell* 120.

One assailing the judgment of an inferior court has the burden of proof as to the absence of jurisdiction.—*Miller v. O'Brien*, 511.

Form.—The docket of a Justice of the Peace after giving the title of the cause the issuance, service, and return of the summons, the appearance of the parties, and trial, proceeded as follows, "the court finds for plaintiff and gives judgment for plaintiff in the sum of $30.00 and costs." *Held* good in form. The omission to state the amount of the demand in the docket entry was held not fatal to the jurisdiction.—*Miller v. O'Brien*, 511.

Name of Plaintiff.—Action by one Wyatt upon a judgment recovered in another state. It was contended that the exemplification produced showed a judgment recovered by Morris and not by Wyatt. But the record declaring that "Nannie Morris, whose name is now Nannie Wyatt, be and hereby is," etc., the contention was rejected.—*Interstate Co. v. Wyatt*, 217.

Vacating—Effect.—A writ of garnishment issued upon a judgment is without vitality after the judgment is vacated. Such ancillary proceedings fall with the judgment.—*House v. Anderson*, 357.

Of Another State.—Any duly authenticated transcript of a judgment recovered in the court of another state is, in general, entitled to full faith and credit in the courts of this state.

But the courts of the state where the judgment of another is sought to be enforced will inquire (1), As to whether the court in which a judgment was rendered had jurisdiction; (2), Whether it was given upon a penal statute, and (3), As has been held, whether the law under which it was recovered is repugnant to justice, or good morals, offends the policy of the latter state, or is calculated to injure such state or its citizens.—*Interstate Co. v. Wyatt*, 217.

Each state should recognize and enforce the public acts and judgments of every sister state, not coming within one or more of the exceptions.—*Id.*

JURY.

Where the party is entitled to a jury—Equitable Defenses.—Where the defense is entirely equitable the defendant is not entitled to a jury—*Coe and Stedman Co. v. Coryell,* 61.

JURORS

Competency—Opinion.—A juror admitted having formed and expressed an opinion as to the merits of the action but declared his willingness and ability to put it aside and try the issue solely upon the evidence. The denial of a challenge for cause held not error.—*Hoover v. Jordan,* 515.

LAND.

Growing Crops are part of the land, and though not mentioned pass by an absolute conveyance of the lands.—*Jones v. Dappen,* 21.

LANDLORD AND TENANT.

Lease Construed.—Lease of a store-room. The lessees covenanted to keep the premises in repair, and at the expiration of the lease to surrender them "in as good order and condition as when entered upon, loss by fire, inevitable accident, or ordinary wear excepted." It was further provided that if the premises should "become untenantable by reason of fire or otherwise, the rent should cease while the same were being repaired." *Held,* that the words "or otherwise" are to be taken in a limited sense, conforming to that which precedes; that the clause providing for a suspension of the rent refers only to such an injury to the premises as comes fairly within the provision relieving the tenant from the burden of repairs.—*Post v. Lang,* 270.

Assignment of Lease—Effect.—The tenant's assignment of the lease under which he holds does not pass to the assignee his right of action for a previous breach of the landlord's covenants.—*Roberts v. Lehl,* 351.

Tenant's Right to Surrender—Waiver.—Where, under the terms of the lease the tenant is entitled to surrender, if the premises become untenantable, he must act promptly and vacate the premises without unnecessary delay. Failing in this, he waives his right.—*Post v. Lang,* 270.

The tenants quit the premises, before the expiration of the term, alleging their untenantable condition, and invoking a provision of the lease which they claimed entitled them to surrender. But it appeared that after the injury to which they attributed the untenantable condition they made repairs, and continued in occupancy for more than three months, conducting their business as before, and manifesting no intention to surrender. They then began to remove, and continued moving for several weeks, during all this time voluntarily paying the rent, as it matured. *Held,* they had waived their right to surrender.—*Id.*

LIBEL.

Priviledged Communication.—If the occasion, the motive, and the cause are proper, and the communication made in good faith, malice is not implied, but must be proven by the person complaining.—*Hoover v. Jordan,* 515.

The mere falsity of the defamatory matter is not sufficient to raise a presumption of malice.—*Id.*

Excessive or unnecessary publication, or employing the privileged occasion in bad faith, for any improper motive, tolls the privilege.—*Id.*

LIBEL—Continued.

A communication by the patrons of a public school, directed to the School District Board, complaining of a female teacher, and characterizing her conduct as "immoral or improper" was *held* one of qualified privilege. The testimony showing some reason or excuse for the charges made, and the abscence of malice clearly appearing, it was *held* that the court should have directed a verdict for defendant.—*Id.*

Burden of Proof.—The defendant has the burden of showing the privileged character of the communication, and the plaintiff of showing circumstances which take it away.—*Id.*

Excessive Publication.—The alleged libel was a communication by the patrons of a public school to the School District Board, impeaching the conduct of a teacher. It was shown to no one other than patrons. At the meeting of the board to consider it, the subscribers to the petition were requested to be, and were present;—also an attorney and a stenographer, not by the request or connivance of the petitioners. *Held* the petitioners were not responsible for the presence of the attorney or the stenographer.—*Id.*

Justification Pleaded, even though not supported by the evidence does not take away the privilege.—*Id.*

LIFE INSURANCE.

Construction of Policy.—A policy of life insurance is construed by the same rules as other contracts.—*United Commercial Travelers v. Boaz,* 423.

Notice of Death or Accident.—A provision of the policy that in case of an accidental injury to the assured, notice must be given within a specified time, to a designated officer of the insured, and that the failure to give the notice "shall be deemed a waiver of all claims" against the insured, is a lawful condition. A failure to give the notice, no excuse being shown, defeats an action upon the policy, even though the failure is the result of accident, or negligence not involving any element of bad faith, and no prejudice to the insurer by the failure to give the notice is shown.

The husband of plaintiff was a member of the defendant, a fraternal order maintained solely for the benefit of its members and their beneficiaries. The constitution of the order provided that in the event of an accidental injury for which a death claim might accrue against the order, "notice of the accident must be given in writing to the Supreme Secretary, within ten days after the accident." The husband died from the effects of a dose of arsenic, taken by accident, as plaintiff alleged, on the same day with his death. Eight days after the accident plaintiff's attorney mailed a notice thereof, and of the death, to the Supreme Secretary at Chicago, Illinois. The office of the Supreme Secretary was maintained in Columbus, Ohio, and the plaintiff knew this, or had the means of knowledge. The notice was not received by the Secretary until the 19th day after the accident. No excuse for the misdirection of the notice, or for the failure to mail it at an earlier day, was pleaded or proven. No prejudice to the order for this delay appeared, nor was bad faith on the part of the plaintiff suggested. The defendant pleaded the failure to give the notice, and that the death was not accidental. *Held* there could be no recovery.—*United Commercial Travelers v. Boaz,* 423.

LIFE INSURANCE—Continued.

Immediate Notice, or the like, construed to mean notive in a reasonable time, in view of all the circumstances, and ordinarily a question for the jury.—*Id.*

Excuses for the Omisison to Give the Required Notice must be pleaded and proved by one claiming under the policy.—*Id.*

Waiver of Conditions by the Insurer.—The insurer relying upon the failure to give a notice required by the policy may at the same time plead other defenses. The inter-position of an additional defense is no waiver of the absence of notice. Neither is the retention, without objection, of a notice not received in due time; nor the sending, at request of the beneficiary, of customary blanks for the proof of death, after receipt of the notice, not in time, the insurer expressly reserving all rights.—*United Comemrcial Travelers v. Boaz,* 423.

LIMITATIONS.

Color of Title.—A treasurer's deed not acknowledged is not color of title.—*Minter v. King,* 233.

Evidence Examined, and *held* that the plaintiff's demands were barred by the statute.—*Culkin v. Matz,* 198.

MARRIAGE.

Common Law—Evidence.—The evidence to establish a common law marriage must be clear, consistent and convincing, especially ,where, to establish such marriage, will be to lay ground for the prosecution of either party for bigamy, or to invalidate a subsequent marriage in which all the requirements of the statute have been observed.—*Peery v. Peery,* 533.

Reputation, to establish a common law marriage must be general and uniform.—*Id.*

Action for divorce and alimony, plaintiff claiming as a common law wife. The evidence examined, and held insufficient to establish the alleged relation.—*Id.*

MASTER AND SERVANT.

Wrongful Discharge—Damages. Where a servant is discharged, without cause, before the lapse of the period of his employment, and the sole defense of the master is the failure of the servant to use reasonable effort to secure other employment, such failure is matter of defense. It is for the master to show what the servant earned or by reasonable effort might have earned subsequent to his discharge, and during the period for which he was employed.—*School District v. Nash,* 551.

A school teacher, wrongfully discharged, and securing employment in a different locality, is entitled to an allowance for expenses reasonably incurred in seeking new employment and for an increase in his expenses, occasioned by the removal to the new locality, and may show such increase in his expenses without pleading it.—*Id.*

But the expense of removing the teacher's family to the new locality can not be considered unless specially pleaded.—*Id.*

Mitigation of Damages. One employed as the principal of a high school is unlawfully discharged before the term of his service has commenced; but he is offered employment as superintendent of a grade school, at the same place, for the same time, and under the same salary, on condition that he shall waive his claim for damages under the former employment. It is his duty to accept the employment so offered, and having rejected it, and brought an action for the unlawful discharge, he is entitled to only nominal damages.

MASTER AND SERVANT—Continued.

The character and grade of employment being substantially the same, the fact that one was a step above the other is not sufficient to warrant the rejection of employment in the lower grade.

But if the employment offered him, in the second place, had been uncertain as to salary or time of employment, or if he had been offered a less salary, he would have been under no duty to accept it upon the specified condition.—*Ryan v. Mineral High School District*, 63.

MINING PARTNERSHIP.

Authority of Partner. The managing member of a mining partnership has no implied authority to execute a promissory note in the firm name for his private debt; nor for money borrowed on account of the partnership, where the operations of the partnership are highly profitable, and there is no occasion for the loan.—*Carlton v. Cone*, 58.

MAXIMS.

Portior est conditio defendentis. The law will not lend its aid to either of the parties to an executory contract, the purpose of which was to defraud a third.—*Abernethy v. Wright*, 239.

MINING CLAIMS.

Application for Patent—Adverse Suit—Co-tenant Not Joined. A stranger interposing an adverse claim will not be heard, in the action in support thereof, to object to the non-joinder of a co-tenant of the applicant for a patent.—*Lancaster v. Coale*, 495.

NEGLIGENCE.

Conributory Negligence—Last Clear Chance. Though the negligence of plaintiff has placed him in a position of peril, yet, if defendant observes his peril in time to avoid doing him injury, by the exercise of due care, and fails to exercise such care, the prior negligence of the plaintiff is not deemed contributory. The later negligence of defendant, he having opportunity to avoid the injury, is not only the proximate, but the sole cause of the injury, the prior negligence of the plaintiff being regarded as having created only a condition, without which the injury would not have happened, and not as the cause of its occurrence.—*Colorado Springs Co. v. Merrill*, 382.

Anything conflicting with this in the opinion in *Denver Company v. Gustafson*, 21 Colo. App., 178, is overruled. Defendants' car moving to the East, approached a street upon which plaintiff was walking to the North. From the moment of plaintiff's entry into the street upon which defendant's tracks were laid, the car was plainly to be seen; and the plaintiff liekwise was in plain view of those upon the car. Plaintiff walked leisurely into the street, looking neither to the right or left, and giving no manifestation that she was aware of the approach of the car. Nevertheless, though her peril, and that she was unconscious of it, were manifest, the motorman gave no signal of his approach, and made no effort to check his speed until "right upon her." Plaintiff was struck by the overhang of the car, at the instant of passing the northernmost rail. *Held* that notwithstanding plaintiff's negligence, in view of the reckless conduct of the motorman, the case was properly felt to the jury.—*Id.*

NEGOTIABLE INSTRUMENTS.

Cotemporary Parol Agreeemnt as to Payment. Of even date with a promissory note the maker subscribed for a share of stock in the corporation named as payee therein. In an action upon the note by an assignee, after maturity, it was *held* that a parol agreement, cotemporary with the execution of the note, and upon the faith of which it was executed, to the effect that the note would be paid from the maker's share in the dividends of the corporation, and not otherwise, was a complete defense to the action.—*George v. Williams*, 400.

Conditional Delivery.—Where a promissory note is in the hands of the corporation payee, named therein, the maker may defeat an action thereon showing under proper averment that he subscribed the paper, solely to enable the corporation to pledge it, temporarily, with a bank, as security for a loan, that the loan was in fact made, and the note afterwards restored to the corporation. (Rev. Stat., sec. 4479.)—*Devine v. Western Slope Association*, 368.

Failure of Consideration.—One who is induced to purchase stock in a corporation then being organized, by the representation that the corporation is to limit its operations to the shipment of fruit grown by its stockholders, and that only by uniting with it will he be able to secure its service in the shipment of his fruit, may defeat an action upon a promissory note given for the stock, by proof that in fact, the corporation engaged in a general commission business, and had refused, and confessed itself unable, to ship his fruit.—*Divine v. Western Slope Association*, 368.

Presentment for Payment.—A promissory note expressed to be payable at a bank named therein is sufficiently presented for payment by the deposit thereof in such bank, for collection.—*De La Vergne v. Globe Printing Co.*, 308.

Notice of Dishonor, need not be alleged in an action against the endorser, where it is alleged that payment was demanded of him.—*Id.*

Oral Notice of Dishonor, suffices. (Rev. Stat., sec. 4459.) *Id.*

Time of Notice.—A promissory note payable on the fifth of the month was presented for payment on that day and dishonored. The holder residing in Denver and the endorser in Colorado Springs, oral notice to the endorser on the seventh was in due time. (Rev. Stat., sec. 4567, cl. 2.)—*Id.*

Promissory Note—Subscribed by Officers of a Corporation, with Their Title Affixed, following the name of the corporation, and bearing the corporate seal, construed to be the undertaking of the corporation alone, although in the body of the note the makers were described by the words, "I, we, and each of us," and though there was no preposition following the corporate name.—*New England Co. v. Shook*, 30.

NEW TRIAL.

Second Verdict.—Judgment for plaintiff upon evidence of doubtful sufficiency. Plaintiff having twice prevailed, before the jury, upon the same issues, the court of review declined to disturb the judgment.—*Hazard v. Fostoria Co.*, 118.

There was a seeming conflict in the evidence, and there appeared to have been three trials at *nisi prius*. The court declined to disturb the judgment.—*Fraternal Association v. Collier*, 245.

Appeal and Error.—Verdict on conflicting evidence, upon a second trial, and judgment thereon. The court refused to disturb the result.—*Idelson v.*

NEW TRIAL—Continued.
Robinson, 507.

Excessive Damages—Weight of Evidence.—An award of excessive damages not supported by the weight of the evidence vacated.—*Riverside Co. v. Smylie*, 321.

PARTIES.

Indispensable.—Where the plaintiff relies upon a contract by the terms of which the defendants are entitled to the surrender of a promissory note, then held by the plaintiff, and it appears that plaintiff has assigned the note to a third person, the assignee is an indispensable party.—*Newman v. Tibbitts*, 325.

PAYMENT.

Debtor May Direct Application.—A debtor paying money to his creditor is entitled to direct its application; and the creditor is bound to give credit accordingly.—*Culkin v. Matz*, 198.

And it is not necessary that the debtor should expressly state his purpose as to the application of the payment; if from the circumstances it may be clearly implied, the creditor is bound to respect it.—*Id.*

The creditor asserting several demands, one of which is admitted and the others denied, it will be presumed, in the absence of evidence to the contrary, that any payment made was intended by the debtor to be applied upon the demand admitted.—*Id.*

PLACE, LAW OF.

Covenants for Title.—Semble.—That an action lies in our courts for the breach of the covenant of seizin in a conveyance of lands situate in another state.—*Stearns v. Jewell*, 390.

PLEADINGS.

Construed.—Averment that the defendant's testator "received to the use of the plaintiff" a sum of money mentioned, suffices to admit testimony that the moneys were obtained by false and fraudulent representations.—*Selkregg v. Thomas*, 259.

The complaint relied upon an agreement, and a conveyance of lands, executed in the name of one of the defendants, by an attorney in fact. The answer denied the authority of the alleged attorney in fact, not pleading the statute of frauds. Parol evidence in denial of the authority was received below, and considered in the court of review.—*Newman v. Tibbitts*, 325.

Demand of Excessive Damages, does not impair the plaintiff's right to recover according to the true measure. The complaint is not subject to demurrer.—*Roberts v. Lehl*, 357.

Defects of Form.—Bad grammar, surplusage and ambiguity are not fatal to a complaint. If enough can be culled therefrom to show that plaintiff is entitled to relief a general demurrer must be overruled.—*Gregg v. Hayes*, 412.

The complaint examined and held sufficient to sustain an action to rescind the contract.—*Id.*

Aider by Pleading Over.—Action against the endorser of a promissory note, the complaint not alleging notice to him of the dishonor. The defendant's answer having denied notice, and this denial being put in issue by the reply, *held* the defect of the complaint was cured.—*De La Vergne v. Globe Co.*, 308.

PLEADING—Continued.

Agreement Supplying Absence Of.—Complaint against two. A third defendant was afterwards joined and summoned but no complaint was filed against him, nor any answer from him demanded. The cause was set for trial by agreement. Application for a default as to the third defendant two or three days after the trial, was properly denied upon the ground that apparently any pleading on his part had been waived by agreement.—*Herbert v. Patrick*, 204.

Motion to Make More Specific—Discretion.—Complaint for injuries to plaintiff's live stock while being transported upon defendant's train. Considering that defendant's agents were in charge of the train, and must have had full knowledge as to how it was operated, *held* not a violation of discretion to deny a motion to make the complaint more specific.—*Union Pacific Co. v. Libby*, 111.

Motion for Judgment On is not to take the place of a demurrer.—*Miller v. Houston* 89.

During Trial.—The practice of moving for judgment on the pleadings after going to trial condemned.—*Id.* 89.

When Allowed, only where there is an admission that precludes a recovery, or the case stated is such that if established by proof no recovery can be had.—*Id.*, 89.

Presumptions.—Where defendant moves for judgment on the pleadings, pending the trial, all the allegations of the complaint are taken as true.—*Id.*

And the moving party admits the falsity of all his own allegations which are denied by his adversary.—*Id.*, 89.

Amendments—Discretion.—Plaintiff's reply admitted that the promissory note which was the foundation of the action, was the note of a corporation the name of which was subscribed thereto. It had presented the same note, as a claim against the corporation, in bankruptcy proceedings, and had adduced sworn testimony to sustain it as such. *Held* it was not an abuse of discretion to deny its application to withdraw the admission contained in the reply.—*New England Co. v. Shook*, 30.

Amendment—New Cause of Action.—Action by a land broker to recover commissions. The complaint alleged that defendant had agreed to pay as a commission, a specified sum. An amendment alleged that defendant agreed to pay "the regular commission, usual and customary." *Held*, not a new cause of action.—*Idelson v. Robinson*, 507.

What Must Be Specially Pleaded.—Action by broker against land owner for commissions under a sale secured by the broker. If the land owner would assert the revocation of the broker's authority previous to the sale he must plead it specially.—*Mauser v. Hurdle*, 567.

Answer—Several Defenses.—A Life Insurance Company does not, by pleading other defenses, waive the failure of the beneficiary to give the notice of death required by the policy.—*United Commercial Travelers v. Boaz*, 423.

Power of the Court over the Issues.—The court has no power to set aside the issues as framed by the pleadings, and direct the trial to proceed upon different issues.—*Creighton v. Campbell*, 120.

PRACTICE.

Waiver of Objection.—One who appears to contest in the County Court, a motion for a new trial, without objection, will not be heard to afterwards object that the motion was not made in due time.

Error in the denial in the District Court, of a motion to dismiss an appeal from the County Court, is waived by proceeding to trial upon the merits.—*Butler v. Maier*, 365.

PRECEDENTS.

Effect.—Where by well settled judicial precedents it has been determined that contracts of a particular character are opposed to public policy, this declaration of the law is equal in force to a statute.—*Oliver v. Wilder*, 337.

PRINCIPAL AND AGENT.

Agent's Authority—Evidence—Burden of Proof.—Plaintiff seeking to charge defendant with the contract of another, upon the ground that the latter, in making the contract, acted as agent of defendant, has the burden of proving the agency, and that the agent was acting within his authority.

The evidence examined and held insufficient to establish plaintiff's case. —*Nitro Co. v. American Mills*, 373.

Known Limitations Upon the Agent's Authority—Effect.—One dealing with the agent in a matter which, as he knows, is in excess of an express limitation upon the agent's authority, will not be heard to assert that the act of the agent was within the apparent scope of his employment.—*Id.*

Authority to Convey Lands.—Under Rev. Stat., sec. 2660, authority to convey lands can be conferred only by writing.

Ratification, of the acts of the agent who assumes to convey the lands of his principal, without written authority, can be affected only by writing.

A conveyance by the principal to a third person is an effectual repudiation of the act of the agent. —*Newman v. Tibbitts*, 325.

How Far Principal Affected by Knowledge of the Agent.—The principal is not affected by the knowledge of the agent in a matter in which he acts entirely for himself.

Defendant dealing with the cashier of a bank, in a matter in which he was acting entirely for himself, as defendant knew, executed, at the cashier's request, a promissory note to the bank. The discount committee of the bank, being informed by the cashier that he had taken the note upon the sale of property accepted it, and the cashier obtained the money thereon. *Held* that the cashier's knowledge of the transaction was not to be imputed to the bank.—*First National Bank v. Martin*, 324.

PRINCIPAL AND SURETY.

Varying Terms of Contract to Surety's Prejudice.—A building contract, in which defendant was surety for the contractor, provided that a deed of the premises whereon the building was to be erected, which were the propery of the contractor should be delivered to the plaintiff upon the completion of the contract. Prior to the completion of the building a conveyance was prepared, executed by the contractor and deposited in escrow. The agreement evidencing the deposit provided that the deed should be delivered upon the completion of the building or upon the failure of the contractor to complete it. *Held*, that this provision imposed no additional burden upon the contractor or the surety, and had not the effect to discharge the surety.—*Equitable Co. v. Conners*, 213.

PRINCIPAL AND AGENT—Continued.

Surety Companies—Contracts of—Construction.—The contracts of surety companies are construed like other contracts. The rule that the contract of a surety is *strictissimi juris* has no application.—*Curry v. Equitable Co.*, 175.

PROCESS.

Party's Right to Control—The plaintiff is entitled to control his process and direct upon what properties his attachment or writ of execution shall be levied.

If the sheriff violates his instructions the plaintiff is not liable for the consequences of his misconduct.—*Curry v. Equitable Co.*, 175.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

RAILROADS.

Equipment Contract.—Petitioners applied for an order requiring the receivers of a railroad to deliver into their possession two locomotives, sold to the railway company by petitioner's assignor, by contract under secs. 5523-5525 of the Revised Statutes, the title being retained until full payment of the purchase price. The contract complied in all things with the requirements of the statute. The price was $18,000.00, of which $500.00 remained unpaid. All this was admitted by the answer. It did not appear that any labor bills were overdue; that there was any other creditor whose claim was upon an equal footing with that of petitioner's; that the locomotives were necessary to the maintenance of the road, or that, to surrender them, would in any way embarrass the receivers. *Held*, that the petitioners were entitled as of right to the order; an order of the District Court denying petitioners' motion for judgment on the pleadings was reversed, and the court directed to enter judgment requiring the receivers to pay the balance due under the contract, or surrender the locomotives.—*Central Locomotive Works v. Smith*, 449.

REAL ESTATE AGENT.

See BROKER.

SALE.

Change of Possession.—The provision of the statute of frauds that every sale of goods not accompanied by an actual and continued change of possession shall be presumed fraudulent as against creditors (Rev. Stat., sec. 2668), has no application, where, prior to such sale, the vendor has placed the goods in possession of a bailee, and such bailee, being informed of the sale, agrees to hold them for the purchaser.—*Morrison v. McCluer*, 264.

SCHOOLS.

Employment of an Unlicensed Person as a Teacher.—Under Rev. Stat., sec. 5990, a contract by a school board employing as a teacher one who has no license to teach is absolutely void.—*School District v. Johnson*, 26 Colo. App., 433, followed.—*School District v. Kirby*, 300.

SPECIFIC PERFORMANCE.

Discretionary.—In general specific performance will be granted only when, in view of all the circumstances, it is manifest that justice will be subserved. It is not sufficient to show a perfect legal obligation to perform the contract relied upon. It must also appear that specific performance will work no hardship nor injustice.

SPECIFIC PERFORMANCE—Continued.

The evidence examined and the contract appearing to have been obtained by wilful misrepresentation of fact, and to involve serious loss to defendant a decree directing specific performance was reversed.—*Rinderle v. Morse*, 457.

STATUTES.

Penal.—The name ascribed to a statute by the legislature which enacts it, or the courts of the same jurisdiction, is not the test of its character as to whether it is in essence and effect a provision for the punishment of an offense against the public, or the grant of a civil right to a private person.

A statute of Texas allowing the recovery of usurious interest paid to the usurer was held not a penal statute, in such sense as to prohibit a recovery here, upon a judgment given thereunder in one of the courts of Texas.—*Interstate Co. v. Wyatt*, 217.

Extra Territorial Effect.—As a general rule the laws of one nation are without extra territorial effect, except upon the principles of comity. As between the states of this Union the same rule obtains, limited by the full faith and credit clause of the Federal constitution.—*Interstate Co. v. Wyatt*, 217.

STATUTES CONSTRUED, CITED OR REFERRED TO.

Revised Statutes, secs. 242, 243—*Miller v. Houston*, 89.

Revised Statutes, sec. 515—*Sorrells v. Sigel-Campion Co.*, 154; *Thompson v. Rowe*, 361.

Revised Statutes sec. 559—*People v. Bolton*, 39.

Revised Statutes, sec. 846—*Crystal Park Co. v. Morton*, 74.

Revised Statutes, sec. 852—*Creighton v. Campbell*, 121; *Thompson v. Rowe*, 361.

Revised Statutes, sec. 865—*Id.*

Revised Statutes, sec. 870—*Thompson v. Rowe*, 361.

Revised Statutes, sec. 873—*Henry v. Semonian*, 487.

Revised Statutes, sec. 875—*Id.*

Revised Statutes, sec. 1177—*Gunnison County v. Davis*, 503.

Revised Statutes, sec. 1179—*Id.*

Revised Statutes, sec. 1204—*Id.*

Revised Statutes, sec. 2067—*Moody v. Sindlinger*, 290.

Revised Statutes, sec. 2416—*Crystal Park Co. v. Morton*, 74.

Revised Statutes, sec. 2461—*Id.*

Revised Statutes, sec. 2462—*Id.*

Revised Statutes, sec. 2464—*Id.*

Revised Statutes, sec. 2553—*Gunnison County v. Davis*, 503.

Revised Statutes, sec. 2554—*Id.*

Revised Statutes, sec. 2660—*Newman v. Tibbitts*, 325.

Revised Statutes, sec. 2665—*Fulton Co. v. Smith*, 279.

Revised Statutes, sec. 2668—*Morrison v. McCluer*, 264.

Revised Statutes, sec. 2912—*People v. Bolton*, 39.

Revised Statutes, secs. 3024, 3025—*Howard v. Mitchell*, 45.

Revised Statutes, sec. 3226-3229—*Phillips Co. v. Cole*, 540.

Revised Statutes, sec. 3233—*Beaver Creek Co. v. Elling*, 252.

Revised Statutes, sec. 3238—*Id.*

STATUTES, ETC.—Continued.

Revised Statutes, secs. 3653, 3654—*Jenkins v. Gold Dollar Co.*, 247.

Revised Statutes, secs. 3934, 3935—*Oliver v. Wilder*, 337.

Revised Statutes, sec. 4013—*Sorrells v. Sigel-Campion Co.*, 154.

Revised Statutes, sec. 4479—*Devine v. Western Slope Ass'n*, 368.

Revised Statutes, secs. 4488, 4489—*Oliver v. Wilder*, 337.

Revised Statutes, sec. 4550—*De La Vergne v. Globe Co.*, 308.

Revised Statutes, sec. 4559—*Id.*

Revised Statutes, sec. 4567—*Id.*

Revised Statutes, sec. 4578—*Id.*

Revised Statutes, sec. 4647—*George v. Williams*, 400.

Revised Statutes, secs. 5523-5525—*Central Locomotive Works v. Smith*, 449.

Revised Statutes, sec. 5730—*Minter v. King*, 233.

Revised Statutes, sec. 5851—*Crystal Park Co. v. Morton*, 74.

Revised Statutes, sec. 5990—*School District v. Kirby*, 300.

Revised Statutes, sec. 6268—*Morrison v. McCluer*, 264.

Revised Statutes, sec. 6577—*Trinidad v. Las Animas County*, 207.

Revised Statutes, sec. 7212—*Conant v. Machen*, 310.

Revised Statutes, sec. 7267—*Selkregg v. Thomas*, 259; *Lancaster v. Coale*, 495.

Revised Code, sec. 29—*Raymond v. Harrison*, 484.

Laws 1865, 109, sec. 7—*Eisenhart v. Denver*, 474.

Laws 1872, 207—*Id.*

Laws 1909 c. 192—*Gunnison County v. Davis*, 505.

Laws 1911, c. 6, sec. 20—*Howard v. Mitchell*, 45; *Selkregg v. Thomas*, 259.

Laws 1911, c. 22, sec. 1—*Lancaster v. Coale*, 495.

Laws 1913, 694—*People v. Bolton*, 39.

TAX TITLES.

Void Deed.—A tax deed not acknowledged is void.—*Minter v. King*, 233.

TRIAL.

Right of Parties to Proceed Under the Issues Presented by the Pleading.—The complaint set up a contract between plaintiff and defendant, and nonperformance thereof, praying damages. As matter of inducement the complaint set up certain frauds practiced upon plaintiff by one not a party, but of which, as alleged, defendant had knowledge. Plaintiff having failed to prove the alleged contract, the court denied defendant's motion for a nonsuit, and against the objections of both parties directed the cause to proceed upon issues which the court declared were formed upon allegations of frauds practiced by one Hitchcock, and defendant's responsibility therefor. Verdict for plaintiff and judgment thereon. The complaint stating no cause of action upon which a personal money judgment against the defendant for the frauds of Hitchcock could be predicated, the action of the court in changing the issues was held error.—*Creighton v. Campbell*, 120.

Questions for the Court.—Where it is sought to condemn private lands for a private way of necessity, the necessity is for the court.—*Crystal Park Co. v. Morton*, 74.

Discharging Jury.—Where it is manifest from the evidence that the defendant entirely fails in his defense, the court may discharge the jury and itself find the facts.—*Post v. Lang*, 270.

TRIAL—Continued.

Jury Referring to Evidence for a Purpose Prohibited.—The jury were instructed to consider particular evidence only for such light as it might afford upon the acts of the defendants, alleged by plaintiff to have been done for the purpose of defrauding him. In fact, the jury considered the evidence for other purposes, and the verdict upon the question whether plaintiff was damaged at all by the acts of the defendants, was based upon this evidence. The judgment was reversed.—*Creighton v. Campbell*, 120.

VENDOR AND PURCHASER.

Merchantable Title Implied.—One offering lands for sale without reservation as to the title impliedly warrants that his title is merchantable and without substantial defect.—*Craft Co. v. Livernash*, 1.

Vendor's Lien—Waiver Of.—The vendors accepted the promissory note of a third person in lieu of the second instalment of the purchase money, giving the purchaser, and the depositary of the deed, to understand that the note was accepted as payment of that instalment, or at least as a release of any lien upon the land for the amount; and made no attempt afterwards to correct this impression, purposely concealing their intention to claim a lien upon the land for the second instalment. Accordingly, the third and last instalment being discharged at the appointed time, the depositary delivered the conveyances. *Held*, that although the promissory note so accepted was long overdue, plaintiffs were estopped to assert a lien for the second instalment.—*Hazard v. Fostoria Co.*, 118.

Waiver of Condition.—An agreement between plaintiff and defendant for the exchange of lands, recited that the lands of defendant were subject to a mortgage, of which $2,000 matured in 1912. Plaintiff was, however, distinctly advised, before concluding the exchange, that more than $2,000 of this mortgage would mature in 1910, and with this knowledge he accepted a conveyance from defendant and executed a conveyance of his own land to defendant. *Held* that he had waived this provision of the agreement and was not entitled to rescission.—*Milliken v. Neil*, 545.

VENUE.

Change of Venue.—Under sec. 27 of the Code of 1887 (Rev. Code, sec. 29), it seems that in an action for the price of goods sold it is the privilege of the plaintiff to designate the county of his residence as the place of trial. An application for a change of venue in such case, solely upon the ground that such county is not the proper county, should be denied.—*Raymond v. Harrison*, 484.

Waiver.—Where an application for a change of venue is improperly granted, the error is waived by proceeding to trial in the county of the new venue, without objection.—*Id.*

WAIVER.

The improper allowance of a change of the venue is waived by going to trial in the court to which the venue is changed, without objection.—*Raymond v. Harrison*, 484.

An appearance only for the purpose of moving to dismiss a writ of error is no waiver of the *sci fa.*

Nor is defendant's receipt of a copy of the abstract and brief.—*Cooper v. Golden, Etc., Co.*, 499.

WAIVER—Continued.

The insurer relying upon the failure to give a notice required by the policy may at the same time plead other defenses. The interposition of an additional defense is no waiver of the absence of notice. Neither is the retention, without objection, of a notice not received in due time; nor the sending, at request of the beneficiary, of customary blanks for the proof of death, after receipt of the notice, not in time, the insurer expressly reserving all rights.—*United Commercial Travelers v. Boaz*, 423.

Agreement for exchange of lands—One who accepts the conveyance of the other, with full knowledge that one of the conditions upon which he consented to the exchange, is not true, waives such condition.—*Milliken v. Neil*, 345.

The pleading of other defenses to an action upon a life policy is no waiver of the failure of the beneficiary to give notice of the death, as required by the policy.—*United Travelers v. Boaz*, 423.

A vendor's lien is waived by accepting the promissory note of a third party for the purchase money, giving the purchaser to understand that it is accepted as payment.—*Hazard v. Fostoria Co.*, 118.

Contesting, a motion for a new trial, without objection, waives the failure to file the motion in time.

Error in denying a motion to dismiss an appeal is waived by going to trial upon the merits.—*Butler v. Maier*, 365.

WATER RIGHTS.

Adjudication of Priorities—Single Stream.—Semble.—That an adjudication may be had of the priorities of consumers from a single stream.—*Phillips v. Cole*, 540.

Decree—Change of Use.—A consumer will not be heard to complain that in a decree adjudicating priorities another consumer is permitted to change the use from storage to direct use, where he is in no manner prejudiced by the change.—*Id.*

Change of Point of Diversion—Statute Construed.—The statute regulating the proceeding for securing the right to change the point of diversion (Rev. Stat., secs. 3226-3229), applies only to the case of a water right already adjudicated. It is not error to permit a change of the point of diversion, in an original proceeding for the adjudication of the water rights upon a particular stream, all parties in interest being present, and no prejudice to those complaining being shown.—*Id.*

IN IRRIGATION WILLS.

Reasonableness or Unreasonableness of provisions, is to be considered by the jury in determining both the questions of mental capacity, and of undue influence.—*Nelson v. Nelson*, 104.

WORDS AND PHRASES.

Immoral and Improper.—Doubted if the phrase should be construed to impute unchasity, when applied to the conduct of a female.—*Hoover v. Jordan*, 515.

Immediate Notice, Prompt Notice, etc.—Construed to import notice in a reasonable time, depending on the circumstances.—*United Travelers v. Boaz*, 428, 429.